80-6324

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SUPREME COURT, U.S.

NO. A-694

In the

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAR 10 1981
Alexander L. Stevas, Clerk

CHARLES MILTON,
Petitioner,

v.

THE STATE OF TEXAS
Respondent,

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of The Supreme Court Rules (1980) Petitioner respectfully moves the Court to allow him to proceed in forma pauperis, and in support of this motion would show as follows:

I.

Petitioner is an indigent person for whom counsel has been appointed at every stage in the proceedings against him.

II.

Petitioner is presently incarcerated on Death Row of the Texas Department of Corrections at Kunstville, Texas and has no income, or assets with which to pursue his claims before this Court.

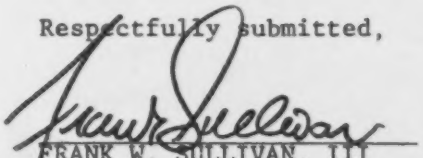
III.

Petitioner has claims arising under the Constitution of the United States and which are more fully described in the Petition for Writ of Certiorari which accompanies this motion.

WHEREFORE, Petitioner prays that he be allowed to

file his Petition for Writ of Certiorari and to proceed before this Court in forma pauperis.

Respectfully submitted,



FRANK W. SULLIVAN, III
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Fort Worth, Texas 76102
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ATTORNEY FOR PETITIONER
(COURT-APPOINTED FOR APPEAL)

AFFIDAVIT OF COUNSEL IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

"I, Frank W. Sullivan, III, being first duly sworn, depose and say that I was appointed as counsel on appeal in the case of Milton v. State, 599 S.W.2d 824 (1980). The Petitioner is an indigent person, who, to my knowledge, has no means available to seek redress before this Court.

In compliance with Rule 46 of the Supreme Court Rules, I have prepared an Affidavit in Support of Motion to Proceed In Forma Pauperis and have mailed the same to Mr. Milton with instructions to answer, sign and mail to this Court for filing.

I respectfully request that the Court accept the Motion to Proceed In Forma Pauperis upon the condition that a proper affidavit, signed by the Petitioner, will be filed as soon as it is available."

Frank Sullivan III
FRANK W. SULLIVAN, III

SUBSCRIBED AND SWORN TO before me this 10th day of March, 1981.

Patricia J. Tilley
Notary Public in and for
Tarrant County, Texas

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NO. A-694

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES MILTON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COUPT OF CRIMINAL APPEALS OF TEXAS

FRANK W. SULLIVAN, III
505 Executive Plaza Building
210 West Sixth Street
Fort Worth, Texas 76102

ATTORNEY FOR PETITIONER
(Court-Appointed)

QUESTIONS PRESENTED

I. WHETHER IMPOSITION OF THE DEATH PENALTY ON THIS PETITIONER WOULD BE A CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE SURPRISE INTRODUCTION OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED THE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III. WHETHER THE REFUSAL OF TEXAS COURTS TO DEFINE OR ALLOW VOIR DIRE ON THE TERMS WHICH JURIES ARE CALLED UPON TO APPLY IN ASSESSING PUNISHMENT IN CAPITAL CASES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV. WHETHER THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY AN IMPROPER COMMENT ON HIS FAILURE TO TESTIFY.

TABLE OF CONTENTS

	Page
Citations to Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	3
How the Federal Questions Were Raised	5
Argument	7
IMPOSITION OF THE DEATH PENALTY ON THIS PETITIONER WOULD BE A CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO CONSTITUTION OF THE UNITED STATES	7
THE SURPRISE INTRODUCTION OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES	11
THE REFUSAL OF TEXAS COURTS TO DEFINE THE TERMS WHICH JURIES ARE CALLED UPON TO APPLY IN ASSESSING PUNISHMENT IN CAPITAL CASES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS	15
THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY AN IMPROPER COMMENT ON HIS FAILURE TO TESTIFY	17
Prayer	19
Filing Affidavit	20
Certificate of Service	20

INDEX OF AUTHORITIES

Cases	Page
Battie v. State, 551 S.W.2d 401 (Tex.Crim.App. 1977).	4,16
Beck v. Alabama, ___ U.S. ___, 65 L Ed.2d 392 (1980).	17,19
Bird v. State, 527 S.W.2d 891 (Tex.Crim.App.1975)	18
Blackburn v. Thomas, 49 U.S. Law Week 3615 note 2	19
Chapman v. Calif., 386 U.S.18 (1967).	18, 19
Chambers v. Florida, 309 U.S. 227, 241 (1940)	10
Chambers v. State, 568 S.W.2d 313 (Tex.Crim.App. 1978). . . .	4,16
Corral-Martinez v. U.S., 592 F.2d 263 (5th Circuit 1979). . .	18
Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979)	13
Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App. 1980). . . .	4,16
Fontaine v. California, 390 U.S. 593 (1968)	18
Francis v. Henderson, 425 U.S. 536, 542 (1976).	19
Furman v. Georgia, 408 U.S. 238 (1972)	11,15-17
Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1979).	12
Gardner v. Florida, 430 U.S. 349 (1977).	11,15
Goodman v. State, 257 S.E.2d569, 583, 584, (N.C. 1978). . . .	13
Gregg v. Georgia, 428 U.S. 153 (1976).	11, 16-17
Greene v. McElroy, 360 U.S. 474, 496-497 (1959).	14
Griffin v. California, 386 U.S. 609 (1965).	18
Jurik v. Texas, 428 U.S. 262 (1976).	15,16
Lockett v. Ohio, 438 U.S. 586 (1978)	11,14,16,17
Mauldin v. State, 308 S.W.2d 36 (Tex.Crim.App. 1957)	12
Milton v. State, 599 S.W.2d 824 (Tex.Crim.App. 1980)	14
Malloy v. Hogan, 378 U.S. 1 (1964)	18
Oliver, Inre, 333 U.S. 257 (1948).	14
Payton v. New York, ___ U.S. ___ 63 L Ed.2d 639 (1980) 648 N.19.	19
Proffitt v. Florida, 428 U.S. 242 (1976).	16
Provence v. State, 337 So.2d 783 (Fla. 1976).	13
Roberts (Stanislaus) v. La., 428 U.S. 325 (1976).	16
State v. Rust, 250 N.W.2d 67 (Neb.1977).	13
Smith v. Estelle, (No.79-1127, cert. granted, March 17, 1980.	15

Warren v. State, 562, S.W.2d 474 (Tex. Crim. App. 1978). . . . 13
Williams v. Florida, 399 U.S. 78, 82 (1970). 14
Woodson v. North Carolina, 428 U.S. 280 (1976) 11,16

Constitutions and Statutes

TEX. PENAL CODE ANN. Sec. 12.31 (1973) 1
TEX. CODE CRIM. PROC. art. 37.071 (1973) 1
TEX. CODE CRIM. PROC. ANN. art. 37.071 (b)(1) and (2)(1973). . 4
TEX. CODE CRIM. PROC. ANN. art. 37.07 (1965). 13
TEX. CODE CRIM. PROC. ANN. art. 37.07 (1973). 13
TEX. CODE CRIM. PROC. ANN. art. 38.08 (1966). 17

Miscellaneous

BLACK'S LAW DICTIONARY (rev. 4th ed. 1968). 9

CITATIONS TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 599 S.W.2d 824 (Tex. Crim. App. 1980), and is attached as Exhibit A. The opinion denying Petitioner's motion for rehearing is attached as Exhibit B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), Petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.
2. This case also involves the following Texas statutes:

TEX. PENAL CODE ANN. Sec. 12.31 (1973).

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless be states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071(1973)

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not exceeding 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

The Petitioner was charged by indictment with murdering Menaree Denton on or about June 24, 1977, in the course of committing a robbery. On his plea of not guilty, the Petitioner was tried before a jury, convicted, and sentenced to die by lethal injection.

On June 11, 1980, the Texas Court of Criminal Appeals affirmed the conviction. The Petitioner's motion for rehearing was denied on December 10, 1980. See: Appendix A & B)

The Incident

On the afternoon of June 24, 1977, Leonard and Menaree Denton were working in the L&M Liquor Store, a business which they owned in Fort Worth, (R.1950). At approximately two o'clock, a black male entered the store, pulled a pistol and ordered Mrs. Denton to give him some money, (R. 2002-2004).

After Mrs. Denton handed over a bag of money, the robber told the Dentons to walk to a back room, (R. 2010). As they walked toward the room, Mr. Denton grabbed the robber's pistol and began scuffling with him, (R. 2013). Mrs. Denton managed to strike the assailant's head with two wine bottles, but the fight continued. Suddenly, the gun fired and Mrs. Denton fell to the floor, (R. 2017).

Mr. Denton yelled, "Why don't you leave? Haven't you done enough? You've killed my wife." According to Mr. Denton, the robber replied, "Hell no, I haven't killed her yet but she is going to die," (R. 2020). The struggle between the two men for control of the gun continued and Mr. Denton was also shot. Despite his wound, however, Mr. Denton managed to twist the pistol out of the robber's hand, and the fight ended, (R. 2024).

When ambulance attendants arrived at the scene, Mrs. Denton was not breathing, (R. 1943). She had been shot one time, (R. 2236-2244).

Fort Worth Police Officers, having recovered the weapon at the scene, requested the Bureau of Alcohol, Tobacco and Firearms to trace the serial number. Ownership of the pistol was traced to a man named Alfred Gray. He told police that the pistol had been loaned to the Petitioner, (R. 2203-2233).

At trial, Leonard Denton identified the Petitioner as being the man who had robbed him, (R. 1993). He stated that during the scuffle the Petitioner kept pushing the gun so that it would point at Mrs. Denton, (R. 2013). On cross-examination, however, he admitted that the gun went off while the two men were fighting and that he could not tell the jury that the gun had not been fired by accident, (R. 2058).

The Trial

During his voir dire of the jury panel, Petitioner's court-appointed trial counsel attempted to elicit from prospective jurors their individual definitions of the terms "deliberately," "probability," and "criminal acts of violence," (R. 178-182, 226-228, 282-284, 332-331, 442-443, 547-549, 604-609, 762-764, 974-975, 1266-1267, 1683-1685). (See Appendix C)

Although the meanings of these words and phrases are crucial to a jury's resolution of the life or death questions under TEX. CODE CRIM. PROC. ANN. art. 37.071 (b)(1) and (2)(1973), Texas refuses to define these terms, Esquivel v. State, 595 S.W.2d 516 (Tex. Crim. App. 1980); Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978); Battie v. State, 551 S.W.2d 401 (Tex. Crim. App. 1977), cert. denied,

434 U.S. 1041 (1978).

During the punishment stage of the trial, the State called three witnesses who testified about prior unadjudicated offenses by the Petitioner that involved possession of a pistol and two armed robberies; (R. 2349-2364, 2365-2377), (See Appendix D). Some of the testimony even related to incidents where no case had been filed against the Petitioner.

During final argument of the guilt-innocence stage of the trial one of the State's prosecutors made a blatant and direct comment on the fact that the Petitioner had not testified:

> "MR. HANNA: ...This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not find him guilty of capital murder..." (R.2313).

Despite the fact that the state failed to introduce any expert testimony that would support its allegation that the Petitioner had acted "deliberately" and that there was a probability that he would commit violent acts in the future so as to constitute a continuing threat to society, the special issues submitted under TEX. CODE CRIM. PROC. ANN. art 37.071 were answered affirmatively. The mandatory death sentence was then assessed.

How the Federal questions were raised and decided below.

The Petitioner's trial counsel attempted to ask prospective jurors how they would define the terms "probability," "deliberately," and "criminal acts of violence," (R. 178-179, 227-228, 283-284, 330-331, 442-443, 547-548, 604-606, 763-764, 974-975, 1266-1268, 1684-1685). (See Appendix C). By bill of exception, Petitioner's trial counsel demonstrated

that the trial court's refusal to allow him to question Venireman Karl Dunn about the word "deliberately" cost the defense a valuable peremptory challenge, (R. 605-609). On appeal, Petitioner argued in his brief that the trial court's refusal to allow a full voir dire was a violation of his Sixth Amendment right to effective assistance of counsel. The Texas Court of Criminal Appeals rejected this contention.

The sufficiency of the evidence to support the jury's findings under Art. 37.071, TEX. CODE CRIM. PROC. ANN. (1973) was attacked at the trial level by a plea of not guilty and in the brief to the Texas Court of Criminal Appeals. Petitioner's claim in this regard was overruled.

The State's use of unadjudicated extraneous offenses was objected to at the trial level (R. 2349-2353, 2353-2364, 2365-2377). (See Appendix D). On appeal, Petitioner contended that their use during the punishment phase of the trial violated his rights under the Eighth and Fourteenth Amendments in that it subjected him to an arbitrary and capricious infliction of the death penalty. That contention was also overruled.

ARGUMENT

I. IMPOSITION OF THE DEATH PENALTY ON THIS PETITIONER WOULD BE A CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Charles Milton may deserve a life sentence in a penitentiary but he does not deserve, and the evidence in this case does not support, a verdict of death. No human being should die on these facts.

This case is a classic example of the injustice which may result from over-zealous and abusive prosecutions under the Texas capital murder statutes. Charles Milton is guilty of aggravated robbery and may be guilty of murder under the felony-murder doctrine. He was guilty of theft of property valued over fifty dollars in 1972. He is obviously guilty of poor judgment and even stupidity. He is not a proper target for death, however, because the death of Menaree Denton was not caused deliberately and there is no competent evidence on which a jury of reasonable people might base a finding that there is "a probability" that this Petitioner would constitute a continuing threat to society.

Under TEX. CODE CRIM. PROC. ANN. art. 37.071(a) and (b)(1973) the jury in this case was required to find, beyond a reasonable doubt, that (1) the conduct of the Petitioner that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result; and (2) that there is a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

During the punishment phase of the trial, the State introduced evidence that the Petitioner was convicted of felony theft in 1972, (R.2337-2345). There was no evidence of any

prior conviction for a crime of violence. Instead, the prosecution called two witnesses to the stand who testified that the Petitioner had also robbed them within a two-day period in June, 1977.

William Hill, a friend of the Petitioner, was called to testify that he had seen the Petitioner have an automobile accident on June 10, 1977, (R.2350). He saw a pistol under the seat of the Petitioner's car and removed it from the scene so that Petitioner would not face more trouble when police arrived, (R.2352).

Bonnie Crabb, a beauty operator, told jurors that at approximately 7:00 p.m. on June 22, 1977, the Petitioner entered her shop, pulled a gun, and demanded money from the cash drawer, (R.2360). The Petitioner then ordered Ms. Crabb into her bathroom and told her to wait fifteen or twenty minutes before calling police, (R.2361). He then fled the scene without doing harm to anyone.

Stacey Meeks, a car dealer, testified that on June 23, 1977, the Petitioner pulled a gun, demanded money and took Meek's rings, watch, billfold, and a diamond wedding ring. Meeks was then ordered into a back room and told to wait ten minutes, (R.2365-2377). He was not injured in any way.

The propriety of using unadjudicated extraneous offenses as "evidence" relevant to the 37.071 questions is discussed elsewhere in this petition. However, even if this Court upholds the prosecution's authority to use such evidence, these facts support the conclusion that Petitioner did not "deliberately" cause the death of the decedent in this case. The robbery modus operandi which is evident from a reading of this transcript encompasses a time span of only three days -- June 22, 23, and 24, 1977.

On each of the occasions prior to Mrs. Denton's death, the Petitioner ordered his robbery victims to a back room -- not for the purpose of doing them physical harm -- but to insure his escape.

When he robbed Mr. and Mrs. Denton he followed the same pattern he had used on the preceding two days. He ordered them to a back room. The Petitioner could not have known that Mr. Denton would engage him in a physical battle for the pistol.

It has been held that "deliberation" and "premeditation" are the same character of mental operation differing only in degree. As stated in BLACK'S LAW DICTIONARY (rev. 4th ed. 1968):

> "...deliberation is premeditation in a cool state of the blood..(it) is not only to think beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon...State v. Hall, 55 P. 2d 740, 742 (N.M. 1936); People v. Thomas, 156 P.2d 7, 17(Cal.1945); State v. Payne, 197 S.E.573(N.C.1938); State v. Roedl, 155 P.2d 741, 749(Utah 1945); State v. Cade, 34 S.W.2d 82,83 (Mo. 1930)."

There is no evidence that the death of Menaree Denton was the result of any "deliberation" under any definition. On the contrary, the chain of events which caused her death did not begin when the Petitioner entered the L&M Liquor Store, but when Mr. Denton began the struggle over the pistol. To say that the Petitioner acted "deliberately" is to ignore the commonly understood meaning of the word.

In Warren v. State, 562 S.W.474(Tex. Crim. App. 1978) the Texas Court of Criminal Appeals reviewed another capital murder conviction. Warren, like the Petitioner, had one prior conviction for felony theft. He entered a house for the purpose of committing a burglary. While there, the

owner of the house walked in and started yelling. Warren pulled a gun and shot the victim in the head. The jury had before it only the evidence of Warren's prior theft conviction and the facts of the case itself. There was no qualified psychiatric testimony which would have had a probative value as to special issue number two under Article 37.071.

In reversing Warren's conviction, the Texas Court held that although the murder committed by Warren was a criminal act of violence, it was not a "calculated act". There was, therefore, no evidence of past violence, no evidence that violence was initially intended and no evidentiary predictions by experts of future violence.

The reversal in Warren and the affirmation of the case at bar by the same court demonstrate that the assessment of death penalties in Texas is, in fact, arbitary and capricious. What evidence was there in this case to support the jury's prediction of future violence? On three days in June, 1977 this Petitioner committed three robberies. He had no history of violence. His modus operandi, as developed by the State's own evidence, was to leave his victim in a safe place for only as long as he needed to make his escape. There was no evidence that the Petitioner had a degenerate or violent personal history or that he lacked respect for human life. The record in this case does not even reflect who pulled the trigger.

This Court has never been hesitant to review capital cases on the basis, that due process incorporates "fundamental" fairness, As stated in Chambers v. Florida, 309 U.S. 227, 241 (1940): "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

The penalty of death is different, not only in degree, but also in kind from any other punishment imposed by law, Gregg v. Georgia, 428 U.S. 153 (1976).

Because death cases are different, "...there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Caroline, 428 U.S. 280, 305 (1976). To allow a jury to answer the questions posed under Texas' article 37.071, without benefit of proper instructions, definitions or competent expert testimony gives to the jury unguided discretion to impose or not impose the death penalty as prohibited by Furman v. Georgia, 408 U.S. 238 (1972). The jury's findings in this case were made through procedures and upon evidence which do not comport with the expectations of this Court as suggested in Lockett v. Ohio, 438 U.S. 586 (1978), Woodson v. North Caroline, 428 U.S. 280 (1976) and Gardner v. Florida, 430 U.S. 349 (1977).

II. THE INTRODUCTION OF UNAJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL WITHOUT PRIOR NOTICE, VIOLATED PETITIONER'S RIGHTS UNDER THE EITHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The use of extraneous matters, the reliability of which has not been established by a court of law, subjects the capital murder defendant in Texas to a substantial risk that the death penalty will be inflicted in an arbitrary or capricious manner, contrary to the Supreme Court's position in Gregg v. Georgia, 428 U.S. 153 (1976). In Texas, a defendant charged with a capital offense is faced with having to defend himself, not only against the case for which he is on trial, but against all other

cases which might be brought against him because of conduct unrelated to the offense with which he is charged. Under Art. 37.07 TEX. CODE CRIM. PROC. ANN. (1973) only final convictions may be used to enhance punishment in all non-capital offenses. Even then, the prosecution may only show the fact that a prior conviction exists; it may not elicit details of prior offenses, Mauldin v. State, 308 S.W.2d 36 (Tex. Crim. App. 1957).

The enactment of Art. 37.071 TEX. CODE CRIM. PROC. ANN. (1973), and its subsequent interpretations by The Texas Court of Criminal Appeals, changed the rights of those accused of capital offenses by declaring that its "all relevant evidence" clause opens the door to the admissibility of unadjudicated offenses, Garcia v. State, 581 S.W.2d 168(Tex.Crim.App. 1979). In the case at bar, the State took full advantage of that interpretation of the statute and called three witnesses to talk about prior unadjudicated offenses involving possession of a pistol and two robberies, (R.2349-2353, 2353-2364, 2365-2377). In each instance, timely objection by the defense was overruled. The record does not reflect that the State gave notice that they planned to offer the objectionable testimony. As Judge Roberts of the Texas Court noted in his concurring opinion in Garcia, supra, "...notice, a fundamental element of due process, must be provided... Allowing proof of unadjudicated, extraneous offenses comes close to allowing one or more 'prosecutions'... simple fairness requires that notice..be given...so that the defendant and his counsel can investigate and prepare a response." The Supreme Court of Tennessee had occasion to review this same question. In reversing a death sentence, the Court held that, even though a state statute permitted the introduction of evidence "relevant

to punishment," it is only admissible if relevant to an aggravating circumstance or to a mitigating factor raised by the defendant, Cozzolino v. State, 584 S.W. 2d 765 (Tenn.1979). In the case at bar, the aggravating circumstance was that the death occurred during the commission of a robbery. There were no mitigating factors offered.

The dissenting opinion in Cozzolino pointed out that the defense had been given actual notice of the prosecution's intent to offer unadjudicated offenses. Even though Cozzolino had known the damaging evidence was going to be used against him, the Tennessee court nevertheless concluded that he was entitled to a new trial. Similar results have been reached in other jurisdictions: Provence v. State, 337 So.2d 783 (Fla. 1976); State v. Rust, 250 N.W.2d 67 (Neb.1977); Goodman v. State, 257 S.E.2d 569, 583, 584 (N. Carolina 1978).

The Petitioner has never been tried for the two robberies offered in evidence against him during the punishment phase of this prosecution. He was never allowed to gather evidence in rebuttal or defense of those charges or given time to investigate and prepare a defense to them.

When Article 37.07 was first enacted by the Texas legislature commentators suggested that it was not clear whether the admissibility of "prior criminal record" would include arrest records, (Judge John Onion, Special Commentary, Art. 37.07 TEX. CODE CRIM. PROC. ANN.(1965). Subsequently, the statute was amended to state that the term "prior criminal record" means a final conviction in a court of record, Art. 37.07 TEX. CODE CRIM. PROC. ANN.(1973). If there is nothing wrong with using unadjudicated offenses during the punishment phase, why did the Texas legislature prohibit their use in the 1973 amendment? More importantly, why should the defendant in a capital case be stripped of a right which is afforded all other defendants?

The evidence offered against this Petitioner during the punishment phase of his trial contributed nothing that would indicate that this killing was "deliberate." As Justice White wrote in his opinion in Lockett v. Ohio, 438 U.S. 586 (1978):

> "...It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime...the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable, or, indeed, any perceptible goals of punishment..."

Lack of Notice

In effect, Texas has unconstitutionally dispensed with the necessity of providing trials for extraneous offenses committed by those who are also accused of capital murder. This Petitioner was not notified of the state's intention to introduce the extraneous offenses as evidence that he should be killed. Indeed, the opinion below lends judicial sanction to this "trial by surprise" procedure by holding, "...there is nothing in Article 37.071, supra, that requires notice to the defendant before extraneous offenses can be introduced", Milton v. State, 599 S.W.2d 824 (Tex. Crim. App. 1980). This argument obviously ignores the basic principle that one of the purposes of giving an accused fair notice is to enable him to prepare for cross-examination and to gather his own witnesses, In Re Oliver, 333 U.S. 257, 253 (1948); Greene v. McElroy, 360 U.S. 474, 496-497 (1959). A capital case is not "...a poker game in which players enjoy an absolute right always to conceal their cards until played," Williams v. Florida, 399 U.S. 78, 82 (1970). The Texas

habit of using evidence without fair notice to a defendant is not new to this court. The disposition of Smith v. Estelle, (No. 79-1127, cert. granted, March 17, 1980), may, therefore, affect this court's decision on this point.

It is axiomatic that "...the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," Gardner v. Florida, 430 U.S. 349 (1977). The evidence upon which this Petitioner was sentenced to die was highly unreliable. The jury was allowed to stray aimlessly into the realm of predicting dangerousness without the benefit of any expert testimony. Their decision has resulted in an arbitrary, capricious, and unusually cruel punishment which is not justified by the facts.

III. THE REFUSAL OF TEXAS COURTS TO DEFINE OR ALLOW VOIR DIRE ON THE TERMS WHICH JURIES ARE CALLED UPON TO APPLY IN ASSESSING PUNISHMENT IN CAPITAL CASES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Furman v. Georgia, 408 U.S. 238 (1972), this Court attempted to abolish statutory schemes that would lead to "wanton" and "freakish" imposition of the death penalty. The Texas Statute, in itself, has been upheld, Jurik v. Texas, 428 U.S. 262 (1976). However, the proposition that the Texas procedures are valid must assume that Texas Courts properly guide juries by providing definitions and explanations of the terms which jurors are called upon to apply in assessing punishment. The words and phrases contained in TEX. CODE CRIM. PROC. ANN. art. 37.071 are the yard-stick by which jurors measure the value of human lives.

Despite the importance of these terms, the Texas Court of Criminal Appeals has steadfastly refused to require trial courts to define them in jury instructions.

Even more significantly the courts will not allow trial counsel to test prospective jurors' understanding of the terms in voir dire examination, Esquivel v. State, 595 S.W.2d 516 (Tex. Crim. App. 1980); Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978), cert. denied 440 U.S. 928 (1979); Battie v. State, 551 S.W.2d 401 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1041 (1978).

As expressed by the decisive joint opinions of three justices in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), Jurek, supra, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), Furman does not require that all sentencing discretion be eliminated, but it does require that it be "directed and limited," 428 U.S. at 189. The "...qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," Lockett v. Ohio, 438 U.S. 586, 604 (1978). The opinions announcing the judgments of this court in Gregg, Profitt, Jurek, Woodson and Roberts upheld the death penalty, "...in the belief that a system providing sufficient guidance for the sentencing decision-maker and adequate appellate review would assure 'rationality', 'consistency,' and 'proportionality' in the imposition of the death sentence," Lockett, supra, at 621.

How many people will consistently apply the same meaning to the term "a probability"? How many people, having an average layman's understanding of the English language, would define the term "deliberate" in the same way? The record in this case shows that at least one prospective venireman would have imposed the interpretation that a deliberate act is a premeditated one (R.605-609). Under the facts of this case, no reasonable mind could

conclude that the death of the decedent was "premeditated." To say that the words contained in Article 37.071 have a common meaning and understanding is to ignore the record.

It is because juries are not given adequate instructions by the Texas courts that trial counsel must be free to ask prospective jurors about the terms during voir dire. How else may counsel make an intelligent use of peremptory challenges? By closing the door to inquiry into these "matters of common understanding," the Texas courts force the defendant in a capital case to rely on the arbitrary, capricious, misconceived, biased, or ignorant, interpretations that may be supplied by the masses without guidance from the courts. Any death verdict returned under such bizarre circumstances must surely be considered arbitrary and capricious and outside the parameters discussed by this court in Furman, Gregg, Lockett, et.al.

To uphold the refusal of Texas courts to define the terms in question is to invite imposition of the death penalty on caprice or emotion, instead of reason. Procedural rules that diminish reliability in sentencing are improper, Beck v. Alabama, ___U.S. ___, 65 L.Ed.2d 392 (1980).

IV. THE PETITIONER WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY IMPROPER COMMENT ON HIS FAILURE TO TESTIFY.

The Fifth Amendment's prohibition against comments on failure to testify was reiterated in Texas by Article 1, Section 10 of the Constitution of Texas and by the enactment of Art. 38.08 TEX. CODE CRIM. PROC. ANN. (1966), which states that "...the failure of any defendant to testify shall not be taken as a circumstance against him nor shall the same be alluded to or commented on by counsel in the cause." Where the issue of a prosecutor's comment

on failure to testify is raised, the test is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify, United States v. Corral-Martinez, 592 F.2d 263 (5th Cir. 1979), Bird v. State, 527 S.W.2d 891 (Tex. Crim. App. 1975).

During final arguments in the guilt or innocence stage of the Petitioner's trial, the prosecutor made the following statement:

> "This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder," (R 2313).

In overruling the Petitioner's motion for rehearing on this point, the Texas Court of Criminal Appeals reasoned that:

> "...two individuals survived the'nightmare' --the appellant who did not testify and Leonard Denton who did testify as an eyewitness to his wife's murder. Therefore, the jury could have inferred that the prosecutor was referring to someone other than the appellant," (Appendix B)

That conclusion is ludicrous. In the same breath that he told the jury, "a person who lived through that nightmare is alive," the prosecutor warned them that the easiest thing in the world for them to do would be "not to find him guilty of capital murder." Only one of the two men who saw this tragedy could have been found not guilty of capital murder -- the Petitioner.

The prohibition against comments on failure to testify was made applicable to the states by the Fourteenth amendment and the decision in Malloy v. Hogan, 378 U.S. 1 (1964). See also: Griffin v. California, 380 U.S. 106 (1965); Chapman v. California, 386 U.S. 18 (1967); Fontaine v.

California, 390 U.S. 593 (1968). In Chapman v. California, supra, it was held that before error of constitutional demension may be deemed harmless it must be determined beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. There was no such finding in this case because the Texas Court of Criminal Appeals insisted on supporting the fiction that no improper comment was made. Moreover, the Court of Criminal Appeals has decided the issue on it merits, thereby eliminating support for any claim by the state that the error was waived by failure to object at trial, Francis v. Henderson, 425 U.S. 536, 542 (1976); Blackburn v.Thomas, 49 U.S. Law Week 3615, note 2; (Decided February 23, 1981); Payton v. New York, ____ U.S. ____ 63 L. Ed.2d 639,648 n.19 (1980); Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979).

In addition, this court held that the same requirement of "reliability" that applies to the sentencing determination applies also to the guilt determination, Beck v. Alabama, ____ U.S. ____, 65 L. Ed.2d 392 (1980). The comment on failure to testify in this case tainted the reliability of the jury's determination of guilt.

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas be granted.

Respectfully submitted,

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(COURT APPOINTED ON STATE APPEAL)

APPENDIX A

Charles MILTON, Appellant,

v.

The STATE of Texas, Appellee.

No. 64268.

Court of Criminal Appeals of Texas,
En Banc.

June 11, 1980.

Rehearing Denied July 2, 1980.

The 213th Judicial District Court, Tarrant County, Tom Cave, J., found defendant

guilty of capital murder and assessed punishment at death, and defendant appealed. The Court of Criminal Appeals, Douglas, J., held that: (1) evidence at punishment phase of trial was sufficient to establish that defendant's conduct that caused death of victim was committed deliberately and that defendant constituted a continuing threat to society; (2) prior notice to defendant of use of other offenses at punishment phase was not required; and (3) admission of photographs was not error.

Affirmed.

Roberts, J., concurred in the result.

Clinton, J., filed dissenting opinion in which Phillips, J., joined.

1. Jury ⇐131(2)

Limiting of voir dire is within trial court's discretion.

2. Jury ⇐131(4)

Trial court's refusal to permit defense counsel to inquire as to veniremen's definitions of deliberately, probability, and criminal acts of violence was not an abuse of discretion.

3. Homicide ⇐354

Evidence at punishment phase was sufficient to establish that defendant's conduct that caused the death of the deceased was committed deliberately. Vernon's Ann.C.C.P. art. 37.071(b).

4. Homicide ⇐354

Elements to be considered at punishment phase of murder prosecution include the circumstances of the capital offense, the calculated nature of the defendant's acts and the forethought and deliberateness exhibited by the crime's execution. Vernon's Ann.C.C.P. art. 37.071(b)(2).

5. Criminal Law ⇐986.2(4)

Existence of a prior criminal record is probative and relevant evidence at punishment phase of proceedings. Vernon's Ann. C.C.P. art. 37.071(b)(2).

6. Homicide ⇐354

Evidence at punishment phase was sufficient to sustain finding that defendant who had been convicted of murder constituted a continuing threat to society. Vernon's Ann.C.C.P. art. 37.071(b)(2).

7. Criminal Law ⇐1208(1)

Article governing procedure for punishment phase after conviction of capital offense does not require that defendant be given notice before extraneous offenses can be introduced. Vernon's Ann.C.C.P. art. 37.071.

8. Criminal Law ⇐1208(1)

Although notice was not required, where prosecutor, in open court, announced that he had let defense counsel examine everything in his file concerning defendant's case and defense counsel filed motion in limine seeking to prevent prosecution from making any reference to extraneous offenses, defense counsel was given ample notice of the offenses which were referred to in punishment phase of trial. Vernon's Ann.C.C.P. art. 37.071.

9. Criminal Law ⇐986.2(4)

Article relating to evidence to be used at punishment phase of trial does not limit evidence of other offenses to those offenses for which final convictions have been obtained. Vernon's Ann.C.C.P. arts. 37.071, 37.071(c).

10. Homicide ⇐354

Admission in capital murder prosecution of photographs of the victim and of the victim and her husband was not error.

Frank W. Sullivan, III, Fort Worth, for appellant.

Tim Curry, Dist. Atty., William D. Kane, Jr., David B. Lobingier, Dale S. Hanna and C. Chris Marshall, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

DOUGLAS, Judge.

This is an appeal from a conviction for capital murder. The jury assessed punishment at death.

[1, 2] Milton argues that the trial court impermissibly limited his voir dire of the jury panel by refusing to permit defense counsel to inquire as to the veniremen's definitions of "deliberately", "probability", and "criminal acts of violence." In *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App. 1978), we held that "[v]oir dire examination could take an unreasonable length of time if attorneys on both sides selected different words throughout a contemplated charge and asked each prospective juror what those words meant." The limiting of voir dire is within the trial court's discretion and we find no abuse of that discretion here. See *Esquivel v. State*, 595 S.W.2d 516 (1980); *Battie v. State*, 551 S.W.2d 401 (Tex.Cr.App. 1977).

[3] Milton also challenges the sufficiency of the evidence at the punishment phase to support the jury's answers to special issues numbers one and two as required by Article 37.071(b), V.A.C.C.P. As to the issue of whether Milton's conduct "that caused the death of the deceased was committed deliberately," the evidence shows that Milton entered a liquor store in Fort Worth that was owned by Leonard and Menaree Denton. Milton pointed a gun at Mrs. Denton and ordered her to give him the money in the cash register. He then ordered the Dentons to the store's back room. Mr. Denton grabbed the barrel of Milton's pistol and started struggling for the gun. According to Denton, Milton kept trying to point the gun again and again at Mrs. Denton. Mrs. Denton broke two wine bottles over Milton's head but the fight continued. The gun went off, killing Mrs. Denton. Denton then yelled, "Why don't you leave? Haven't you done enough? You've killed my wife." Denton testified that Milton replied, "Hell no, I haven't killed her yet, but she is going to die."

On cross-examination, the following exchange occurred:

"Q. All right, and you yourself, Mr. Denton, being honest—you can't tell this jury that this gun didn't go off by accident while you two were struggling, can you?

"A. By accident, no, sir. I can't say that the man didn't pull the trigger. He pulled the trigger this—he was steady, pulling the gun down on my wife each time I would push it away from him. This is what he was trying to do.

"Q. He was—he was steady pulling the gun, but you were steady pulling the gun, too?

"A. I was steady pushing the gun away from him, sir.

"Q. Pushing this way and that way (attorney indicating)?

"A. Yes, sir.

"Q. And you can't tell this jury that this gun wasn't discharged by accident, can you, sir?

"A. I can't say that it wasn't discharged by intentional.

"Q. Mr. Denton, please, sir.

The question is: can you tell this—you can't tell this jury that this gun wasn't discharged by accident, can you, sir?

"A. I don't see why it would be, sir."

In *Smith v. State*, 540 S.W.2d 693 (Tex. Cr.App. 1976), we found the conduct there to have been committed deliberately when there was no evidence that the defendant was under the domination of anyone, nor was he under any mental or emotional pressure. Though Milton argues that the evidence shows an accidental discharge of the pistol, we disagree. Taken in the light most favorable to the verdict, the evidence demonstrates that Milton continually kept attempting to point the gun at Mrs. Denton but was prevented from doing so by Mr. Denton until the fatal discharge. From the evidence of Milton's conduct, one must conclude that Milton "could reasonably expect that death would result" from his conduct

Granviel v. State, 552 S.W.2d 107 (Tex.Cr. App. 1976).

As to the issue of whether there was a probability that Milton would commit future acts of criminal violence, Article 37.071(b)(2), V.A.C.C.P., the evidence shows that on each of the two days prior to the Denton murder Milton committed an armed robbery. Each victim testified that Milton came in to their respective stores under the pretext of doing business with them. Milton then pulled a gun and demanded all the money. He then ordered the victims to a back room, locked them in and ordered them not to either get out or cry out for help for a period of time or he would kill them. This was the same method used in the Denton robbery. Further, a "pen packet" was introduced showing Milton's 1972 conviction for theft over fifty dollars. Finally, evidence was adduced that Milton was seen driving around Fort Worth with a .32 caliber pistol in his car, a different pistol than the one used in the various robberies. Testimony at the guilt phase of the trial showed that Milton, before the armed robberies were committed, kept trying to secure a pistol and finally borrowed the one used in the robberies and the Denton murder from a friend.

[4–6] In *O'Bryan v. State*, 591 S.W.2d 464 (Tex.Cr.App. 1979), we set forth a number of the elements that, when supported by the evidence, will sustain an affirmative answer to special issue number two. Article 37.071(b)(2), supra; 591 S.W.2d at 480–81. These elements include the circumstances of the capital offense, the calculated nature of the defendant's acts and the forethought and deliberateness exhibited by the crime's execution. The existence of a prior criminal record is probative and relevant evidence. Here, the evidence showed that Milton used the same method in each of the three armed robberies he committed. All involved a threat to kill the victim. In the Denton robbery, the evidence showed that Milton on six or seven occasions pointed a pistol at Mrs. Denton with the intent to kill her, only to be prevented from doing so by her husband's intercession. There is more than sufficient evidence for the jury to conclude that Milton constituted a continuing threat to society.

[7, 8] Milton also argues that the trial court committed reversible error when it admitted evidence of the two prior armed robberies. He claims that these amounted to unadjudicated extraneous offenses for which he received no notice. As to the lack of notice, there is nothing in Article 37.071, supra, that requires notice to the defendant before extraneous offenses can be introduced. In the case at bar, the prosecutor, in open court, announced that he had let defense counsel examine everything in his file concerning Milton's case. Further, defense counsel filed a motion in limine seeking to prevent the State from making any reference to extraneous offenses. We find that, under these circumstances, defense counsel was given ample notice of the offenses, even though none was required.

[9] As to the use of the unadjudicated offenses, the Supreme Court of the United States, in *Jurek v. Texas*,, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), stated that the principle focus of Article 37.071(c), V.A.C.C.P., was that all relevant evidence concerning the defendant must be placed before the jury. In *Wilder v. State*, 583 S.W.2d 349 (Tex.Cr.App. 1979), we held that this included the use of unadjudicated offenses at the punishment phase. There is nothing in Article 37.071, supra that limits the evidence to final convictions. See *Garcia v. State*, 581 S.W.2d 168 (Tex.Cr.App. 1979). This contention is overruled.

[10] In his last two grounds of error, Milton complains of the admission into evidence of two photographs, one of the victim after she had been shot and the other of the victim and Mr. Denton standing together. In *Martin v. State*, 475 S.W.2d 265 (Tex.Cr. App. 1976), we held that if a verbal description of the scene was admissible, so was a photograph. The complained of photographs were not so gruesome and inflammatory as to outweigh their probative value. This contention is overruled.

The judgment is affirmed.

ROBERTS, J., concurs in the result.

APPENDIX B

CHARLES MILTON, Appellant

NO. 64,268 VS. - - - - - - Appeal From TARRANT County

THE STATE OF TEXAS, Appellee

O P I N I O N

ON APPELLANT'S MOTION FOR REHEARING

We granted the appellant's motion for leave to file motion for rehearing to consider a ground of error which was not discussed in the opinion delivered on original submission. By his second ground of error the appellant complains that the State improperly commented on his failure to testify. During final argument to the jury at the guilt or innocence stage of the trial the prosecutor stated:

> "This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder."

To determine if the State's argument was improper we must consider whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify. Bird v. State, 527 S.W.2d 891 (Tex.Cr.App. 1975). In applying this test the facts and circumstances of each case must be analyzed. Overstreet v. State, 470 S.W.2d 653 (Tex.Cr.App. 1971). The record in the instant case reveals that two individuals survived the "nightmare" - the appellant who did not testify and Leonard Denton who did testify as an eyewitness to his wife's murder. Therefore, the jury could have inferred that the prosecutor was referring to someone other than the appellant. At any rate, the comment complained of was not necessarily a reference to the failure of the appellant to testify. The ground of error is overruled.

The appellant's motion for rehearing is denied.

Roberts, Judge

DELIVERED: December 10, 1980
EN BANC

APPENDIX C
(Attempts to voir dire on definitions)

like I was talking to you a while ago, there are certain terms and definitions that are set out—or that will be set out in the charge that the Court will give you no definition of. Like the word deliberately, and the criminal acts of violence and conscious objective or desire, there will be no definition of those words in the Court's charge. And you're going to have to take them in the common accepted usage. And everybody, I guess—not everybody but most everybody will have a different understanding as to what that particular word means to them. You understand what I'm saying?

A I understand.

Q Now my question to you at this time, sir, is this: In your common accepted terminology of the word "deliberately," what does that mean to you?

MR. LOBINGIRE: Judge, I'm going to object to that. That's an improper question on voir dire and I cite the Court the Bantey vs. State.

THE COURT: Sustained.

MR. LOBINGIRE: Thank you, Your Honor.

MR. WILLIAMS: Your Honor, I have a couple of other questions of the same nature that I would like to ask of the prospective juror. And could I ask the two of them and if the same objection is

Q So I would like to ask you, please, what your definition or usual acceptation of the word deliberetely means.

MR. LOBINGIRE: Excuse me. May I interrupt? The State would object to it as an improper voir dire question and cite the Court, once again, to Bantey vs. State.

THE COURT: Sustain the objection.

MR. WILLIAMS: Your Honor, may I ask the other two usual questions?

THE COURT: Yes, you may.

BY MR. WILLIAMS

Q Now, Ms. Elz, I'll ask you in regard to the criminal acts of violence, in your understanding of that phrase, would you say that criminal acts of violence can be committed only toward persons or would criminal acts of violence, could criminal acts of violence be committed toward property as well as persons, in your usual and accepted understanding of the term?

MR. LOBINGIRE: Same objection, Your Honor.

THE COURT: Sustained.

BY MR. WILLIAMS

Q Now, one other further question, Mr. Elz: The conscious objective or desire which is set out or used in the defining of the term intentional, I'll ask you what that phrase, what its common and usual

acceptation—what that phrase, conscious objective or desire, would mean to you?

MR. LOBINGIRE: Same objection, Your Honor.

THE COURT: Sustained.

MR. LOBINGIRE: Thank you.

MR. WILLIAMS: Your Honor, on those three questions which I've asked the juror there, I would like to get her answers for the purpose of a Bill. And would the Court like to wait until the decision has been made on the juror?

THE COURT: Yes, the Court would prefer that. Thank you.

MR. WILLIAMS: All right. Could we have about three or four minutes?

THE COURT: Yes, we may.

Let's take a five minute recess at this time.

Ms. Elz, would you go in the jury room there? You'll find, I think, there's some water in there, restroom, whatever. Just make yourself at home.

(Whereupon, the witness retired to the Jury Room and Court was recessed for five minutes, after which the following proceedings were had.)

word deliberately which I asked you if you would require them to prove to you beyond a reasonable doubt that the death was committed deliberately as that term

is understood by you, deliberate?

Now my question to you at this time is: What is your understanding of the meaning of the term deliberately as used in the usual acceptation and common language?

MR. LOBINGIRE: Excuse me. I would object to that. I think that's an improper voir dire question and would cite the Court, once again, to Bantey vs. State.

THE COURT: Sustain the objection.

MR. WILLIAMS: May I go further with the two other questions and then have a Bill after the decision on the juror?

THE COURT: Yes, sir.

BY MR. WILLIAMS

Q Now, in the penalty phase of the trial, if it should go to the penalty phase under capital murder, the question that is asked of you in question number two, is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Now my question to you at this time, Ms. Johnson, is, the phrase criminal acts of violence, would your understanding of the meaning of the term criminal acts of violence, would that include criminal

acts of violence toward persons, or would it be toward property? In other words, what I'm trying to get at is, do you feel that a criminal act of violence can be committed towards people or toward property of both?

MR. LOBINGIRE: I'll object to that, Your Honor, I feel that's an improper voir dire question. I cite once again Bantey vs. State.

THE COURT: Sustain the objection.

BY MR. WILLIAMS

Q The third question, Ms. Johnson, which I'll ask you is: In the definition of intentional, in regard to murder, it says that it must be the conscientious objective or desire of the person to cause the motive before it is intentional. Do you understand?

A Uh huh.

Q Now, I'll ask you what the meaning of this phrase or term is to you in the usual acceptation and common language?

MR. LOBINGIRE: I'm sorry. I was going to object to that, not only on the grounds that it's a misstatement of law. I believe the law states it's conscious and not conscientious. But in addition to that, that it's an improper voir dire question, and would cite the Court to Bantey vs. State.

Now, Mr. Sales, the Legislature has provided by Section 3.01 of the Code of -- of the Penal Code that all words, terms, and phrases are to be taken and understood in the usual acceptation in common language except where they are specifically defined.

Now, I have read off to you here numerous words and phrases that the Court will specifically define to you, I think, in its Charge. There are certain words and phrases that are used in the -- I think would be used in the Charge that would not be specifically defined to you and you have to use them in your common accepted usage,

so the word deliberately is not defined as that word is used in the first question on the capital punishment Charge, and I'll ask you, sir, from your interpretation or your version of the -- what the meaning of the term deliberately is.

MR. LOBINGIER: Excuse me, Your Honor. Object to that, Your Honor. I believe that's improper. Cite the Court once again to Batee versus State.

THE COURT: I'll sustain the objection.

MR. WILLIAMS: May I, Your Honor, ask the usual other two questions prior to -- for the purpose of making a Bill later on?

THE COURT: Yes, you may later on.

BY MR. WILLIAMS:

Q Now, in the second question that would be -- a jury would be required to answer in the punishment phase of a capital murder case there is a phrase criminal acts of violence. They are talking about the -- that would -- probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to any -- or to society.

Now, my question to you, sir, in regard to that phrase -- criminal acts of violence -- would that, sir, in -- that term in the usual acceptance in common language,

would you apply that or would a criminal act against property in your thinking, would that be a criminal act of violence?

MR. LOBINGIER: Object to that, Your Honor, same grounds.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

BY MR. WILLIAMS:

Q Now, the third phrase or term that I want to ask you about, Mr. Sales, is in the word, definition of intentional. The phrase conscious objective or desire to engage in the conduct or cause the result, or, you know, to cause the result, killing.

Now, that phrase conscious objective or desire, what meaning does this term hold to you in the usual acceptance in the common language?

MR. LOBINGIER: Object to that question, Your Honor, on the same grounds.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

MR. WILLIAMS: And may we have our Bill, Your Honor, after this jury has been determined?

THE COURT: Yes, sir.

Now, there's certain words that are used as Mr. Hanna was talking to you about a while ago, if you should get into the penalty phase of a capital case, the first question that the Court would ask of you would be whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

As Mr. Hanna said, the key word in that is deliberately. Did the Defendant cause the death of the deceased when it was committed deliberately?

Now, deliberately, sir, is going to have to be fixed by you in your meaning of the word deliberately.

Do you understand?

A Yes.

Q Because there's no definition of that in the Charge or in the law and our law says that all words and phrases and terms are to be taken and understood in their usual acceptation in common language where they are not

specifically defined, so you have to put your own definition to the term deliberately when you are determining that if you should get to that portion of the Charge.

Do you understand?

A Yes.

Q And you will put your own definition to it and require the State to prove to you beyond a reasonable doubt because, see, the burden of proof goes all the way over into the -- into the punishment stage as well as to the guilt or innocence stage and they would have to prove to you beyond a reasonable doubt that this was committed deliberately as you so understand the meaning of the word deliberately.

Same way on question two, whether there's a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society, so they would have to bring you proof to you, and would you require them to bring proof to you that would prove to you beyond a reasonable doubt that there was a probability ---

A Yes.

Q --- that the Defendant would commit acts of violence in the future? You would require proof from the State on that point?

A Yes.

Q All right.

Now, then, Mr. Howard, there's just a couple of other questions that I would like to ask of you.

As I stated a while ago just immediately before this time, that there are certain terms and phrases that are not defined to you and I would like, if I could, sir, to ask you about what your feelings that the meanings of these words or terms are, the first being the word deliberately.

MR. LOBINGIER: Excuse me, Your Honor. I'm going to object to that on the -- I believe it's improper voir dire question, cite the Court to Batee versus State.

THE COURT: Sustain the objection.

MR. LOBINGIER: Thank you, Your Honor.

MR. WILLIAMS: Your Honor, may I ask along with that question the definition of that particular word, two more phrases prior to making a Bill of Exceptions?

THE COURT: Yes, you may.

MR. WILLIAMS: After the determination has been made as to this juror?

THE COURT: Yes, sir, Mr. Williams.

BY MR. WILLIAMS:

Q All right.

Now, Mr. Howard, in the second question that would be asked of you if you were selected as a juror and if it did go to the punishment phase of the trial on a capital murder case, the second question you would be required to answer is whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Now, my question to you, sir, is this: The term or phrase criminal acts of violence under your interpretation of the law, do you feel that a criminal act of violence is one that has to be committed against a person or do you think a criminal act of violence could be committed against property as well as a person?

MR. LOBINGIER: Excuse me, Your Honor.

I'm going to object to that, Your Honor. I believe it's improper voir dire question.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

BY MR. WILLIAMS:

Q Final question which I have of you, Mr. Howard, is that in the definition of intentionally, it states that a person acts intentionally or with intent with respect to the

Q Okay. Now, if I may, I'll ask you now those terms deliberately, criminal acts of violence, and conscious objective or desire -- I'll ask you again except in a different way. I would like to ask you what your interpretation, what you believe to be the usual acceptation of that word in common language in this community? What you believe the meaning of that word deliberately is?

MR. LOBINGIER: Excuse me. I'm going to object to that, Your Honor. I believe that's an improper voir dire question and would cite the Court to Batee versus State.

THE COURT: Sustain the objection.

MR. LOBINGIER: Thank you, Your Honor.

MR. CARTER: Your Honor, for purposes of the record and for making a Bill

may I go on to the next two questions?

THE COURT: Yes, you may.

BY MR. CARTER:

Q Again, I'll ask you in the same line what you believe to be the usual acceptation in common language, usual meaning in common language of the term criminal acts of violence?

MR. LOBINGIER: Once again, Your Honor, we would object on the same basis.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

MR. CARTER: May I, for purposes of the record, go on to the next question, Your Honor?

THE COURT: Yes.

BY MR. CARTER:

Q And again I'll ask you what your opinion is, what you believe to be the usual accepted meaning, common language of the phrase conscious objective or desire?

MR. LOBINGIER: Once again, Your Honor, we would object on the same basis.

THE COURT: I'm going to sustain the objection, although I believe Mr. Bryant has already defined that. I will still sustain

the objection.

MR. LOBINGIER: Thank you, Your Honor.

MR. CARTER: Note our exception.

Your Honor, for purposes of the record after the decision is made on this juror, may we reserve the right to make a Bill regarding those questions?

THE COURT: Yes, you may.

MR. CARTER: We will pass the witness.

THE COURT: All right.

Mr. Bryant, that's going to conclude the questioning. Now, it's going to take us about five minutes or so to complete the proceedings. Why don't you just excuse yourself into that jury room and make yourself at home?

(At 5:45 p.m. court is
(in recess.)

(At 5:54 p.m. the
(following proceedings
(are had in the
(presence of Juror
(Bryant.)

MR. HANNA: Your Honor, the State will

Q Now, sir, just a couple of more questions. As I just talked with you about the first question if the jury should find the defendant guilty of capital murder, the first question I asked whether or not the defendant-- the conduct of the defendant caused the death of the deceased was committed deliberately. Now, that term, sir, is not defined in our code. So, therefore, you put the meaning to that term as used in usual acceptation of the common language. And I'm sure that you have a particular meaning you put to the word "deliberately", do you not, sir?

A Yes, sir.

Q All right, sir. I would like to know what is your definition, or your feeling on the word deliberately?

MR. LOBINGIER: Your Honor, we're

going to object to that. I believe that is an improper voir dire question, and would cite to the Court Bi T versus State.

THE COURT: Sustained.

MR. WILLIAMS: I have a few other questions I would like to ask the prospective juror for the purpose of making a bill.

THE COURT: Yes, sir, you may.

Q (continued by Mr. Williams) Now, sir, in question number two, in the punishment phase of the trial, if the case went as a capital case on the punishment, you are asked whether it is a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. My question to you now, sir, is that the phrase "criminal acts of violence" is not defined in our code, so you have to put your own particular meaning to that phrase, and, your feelings toward it. My question is: Do you feel that a criminal act of violence can be committed against property, or can be committed only against the person?

MR. LOBINGIER: We object, Your Honor, to that on the same grounds as stated before.

THE COURT: Sustain the objection.

MR. LOBINGIER: Thank you, Your Honor.

Q (continued by Mr. Williams) My last

question to you, sir, is that in the definition of the word "intentionally", the definition says that intentionally or with intent with respect to the nature of his conduct or to the result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. My question to you, sir, is: What meaning you personally put to the phrase "conscious objective, or desire".

MR. LOBINGIER: Pardon me. Your Honor, we would object on the same grounds as stated before.

THE COURT: Sustained.

MR. WILLIAMS: And, we would like to make a bill, Your Honor, after the decision is made on the prospective juror. And, pass the juror.

THE COURT: Yes, sir, you may do so, Mr. Williams.

MR. LOBINGIER: State would accept Mr. Dunn, Your Honor.

MR. WILLIAMS: May we have just a minute, sir?

THE COURT: Mr. Dunn, would you excuse yourself into the jury room. There is water in the restroom. And just make yourself at

D. L. Calvin
Certified Shorthand Reporter

home there, and we'll be with you in five minutes or less.

We'll take a five minute recess at this time, gentlemen.

(Brief recess.)

MR. WILLIAMS: Your Honor, the defendant will excuse Mr. Dunn. For the purpose of the bill we would like to ask those three short questions.

THE COURT: All right. You may do so.

(Mr. Dunn, prospective juror, (examination continued.

BILL

BY MR. WILLIAMS:

Q Now, Mr. Dunn, we're speaking here the fact that the code does not define certain words, and terms, and phrases. When it doesn't, you have to put your own meaning to them. And, my question to you, sir, is what your understanding is of the word "deliberately".

A Deliberately. The fact that he might be doing it knowingly and willingly. The fact that he's going to commit--he's going to walk into a place, and he knows--not necessarily knows--but, he's going in specifically to kill a person.

Q Going in specifically. In other words,

deliberately and specifically could be used interchangeably as far as you are concerned?

A Yes, sir.

Q Would accident or mistake fall under the term deliberately under your definition of deliberately?

A No, sir. Intentionally.

Q Now, sir, on criminal acts of violence. I'll ask you, sir, what that phrase--if that phrase, if you would consider a criminal act against property to be a criminal act of violence.

A No. I'm not with you right now.

Q Well, okay. A criminal act can be committed toward a person, or a criminal act can be committed toward property. In other words, theft.

A Yes, sir.

Q My question to you is: A criminal act of violence, would that term to you mean a criminal act toward a person, or to property, or both?

A One, or both.

Q One, or both. And, conscious objective or desire, in the definition of intentionally, that phrase was used. And, I'll ask you, sir: What meaning would you apply to the phrase "conscious objective or desire"?

A Conscious means he consciously knows

what he's doing. He's capable of knowing everything he's doing. Objective, that's his motive, whatever. That's what he's intending to do.

Q That's what he's intending to do?

A Uh-huh. (Affirmative)

Q All right.

MR. WILLIAMS: That's all the questions we have on the Bill, Your Honor, and would like the record to reflect that had we been able to elicit this information that we have received from these three questions, that we, in all probability, would not have struck the juror, Mr. Karl Dunn.

THE COURT: The record will so reflect that that is the contention of the defense.

Mr. Dunn, you are going to be excused from jury service, and the trial on this particular jury. I'm going to excuse you in just a moment. It is not necessary that you return later, or tomorrow. You are through for the week, in other words. Return to your home, or work, whatever you need to be doing. Before you go, I want to thank you sincerely for your patience and your cooperation with us. I know it's not any fun sitting around out there for

BY MR. WILLIAMS:

Q Mr. Moore, the word "deliberately" as we were talking about a while ago in the first question that would be presented to you in the punishment phase of capital murder, if you should get there, you said that you do have an understanding in your mind of what "deliberately" means

to you, sir?

A Uh-huh.

Q Now, the Code says if a -- if a word or a phrase or a syllable or a phrase or something is not defined under the Code, that you use your own common accepted meaning of the common language.

So my question to you, sir, at this time is: would you tell me what your common acceptance of the term of "deliberately" means?

MR. LOBINGIER: Excuse me.

We are going to object to that, Your Honor. That's an improper veniring question, and we cite to the Court Matthew vs. State.

THE COURT: Sustain the objection.

MR. WILLIAMS: And I have two other questions along that line that I would like to ask, Your Honor, for the purpose of making a bill.

THE COURT: Yes, sir.

BY MR. WILLIAMS:

Q Now, sir, Mr. Moore, in the definition of the term "intentionally" that the Court gives you, it tells you that it must be such that a person -- that it is his conscious objective or desire to engage in the conduct or

cause the result or cause the killing.

I will ask you, sir, what would be that term, "conscious objective or desire" -- that phrase -- what the meaning of that phrase would be to you in the usual interpretation of common knowledge?

MR. LOBINGIER: Excuse me, Mr. Williams.

We will object to that for the same reason stated before.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

MR. WILLIAMS: One further question that would be on the billing, Your Honor.

THE COURT: Yes, sir.

BY MR. WILLIAMS:

Q In the second question of the penalty phase of the capital murder trial, the probability of committing criminal acts of violence in the future to be a continuing threat to society -- the phrase, sir, "criminal acts of violence" -- what I want to know is, sir, in your way of thinking in regard to that term, "criminal acts of violence", do you feel that a criminal act of violence is one that can be committed against the property, or is it one that has to be committed against a person or which way or both?

I will ask you, what is your understanding or thinking of the meaning of the word "deliberately"?

MR. HANNA: Your Honor, we would object to that. We think it's an improper voir dire question, and cite to the Court to the State vs. Batie (phonetically).

THE COURT: I sustain the objection.

MR. WILLIAMS: Your Honor, I have a couple of other questions along the same line. May I go ahead and ask them for the purpose of making a bill after the decision has been made on the jury?

THE COURT: Yes, you may.

MR. WILLIAMS: Thank you, sir.

BY MR. WILLIAMS:

Q On the definition, ma'am, of "intentionally" we have the phrase "conscious objective or desire". That's in that definition of "intentionally" as we read it a while ago --

A Uh-huh.

Q -- to you that a person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

Now, if you would please, ma'am, what would be your feeling on what conscious objective or desire would

mean in the common usage?

MR. HANNA: Your Honor, again we would interpose the same objection to this question.

THE COURT: Sustained.

BY MR. WILLIAMS:

Q One final question, ma'am. Notice in the second question on the penalty or punishment stage of a capital murder case is whether or not the probability of the Defendant to commit criminal acts of violence in the future.

Now, criminal acts of violence -- would you consider a criminal act of violence to be a criminal act against a person or a criminal act against property or both? Which would be your definition of criminal acts of violence?

MR. HANNA: Your Honor, we object and interpose the same objection to that question.

THE COURT: Sustained.

MR. WILLIAMS: Note our exception, Your Honor. We will make a bill when we get to that immediately after the decision is made.

Pass the venireman.

THE COURT: All right.

Mrs. Eschliman, let's take about a

Q All right. Now, the -- our law says that all words, phrases, and terms used in this code are to be taken and understood in their usual interpretation in common language, except where specifically defined. So anything that's specifically defined to you by the Court, that's the definition that you have to use on it, but any term or word or phrase that's not defined to you, well then, it's to be taken and understood in their usual interpretation and common language.

Do you understand?

A Uh-huh.

Q Reasonable doubt -- that's not described or defined to you. You say what it is.

Now, in issue number one if -- if it went to the punishment stage of a capital punishment case, it's whether the conduct of the Defendant that caused the death of the

deceased was committed deliberately -- deliberately and with the reasonable expectation that the death of the deceased or another would result.

Now, would you require the State to prove to you beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately?

A Yes.

Q All right. Now then, Mrs. Booth, I will ask you what would be your definition of the term "deliberately"?

MR. LOBINGIER: Excuse me. I am going to object to that, Your Honor. I believe that's an improper voir dire question, and we'll cite to the Court Batie (phonetically) versus State.

THE COURT: Sustain the objection.

MR. WILLIAMS: Your Honor, may I make a bill on it, Your Honor? I have a couple of other questions I would like to ask her prior to making the bill after the disposition of the juror.

THE COURT: Yes, you may.

BY MR. WILLIAMS:

Q Mrs. Booth, in question number two of the penalty stage if there is capital murder it's whether there is

45

probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Now, that phrase "criminal acts of violence" -- would you consider that to mean a criminal act toward a person or toward property, or how would you feel that would -- what would that mean to you: "criminal acts of violence"?

MR. LOBINGIER: I am going to object to that, Your Honor, for the same reason as my previous objection.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

BY MR. WILLIAMS:

Q All right. One more question, Mrs. Booth. In the definition of "intentionally", the term says that a person must have a conscious objective or desire to do something.

What to you in the common acceptance of the language -- what does "conscious objective or desire" mean to you?

MR. LOBINGIER: Excuse me, Your Honor, I am going to object to that, Your Honor, for the same reasons as stated in my previous objection.

THE COURT: Sustain the objection.

MR. LOBINGIER: Thank you, Your Honor.

probability that he'll commit criminal acts of violence in the future. Not a possibility, but a probability that it's going to happen. Anything is possible, you understand.

A Yes.

Q Do you understand the meaning of those terms?

A Yes.

Q There is a third question that can be asked of you. If raised by the evidence whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Do you feel like you understand that?

A Yes, I think so.

Q And you understand that the State would have to prove to you beyond a reasonable doubt that your answers should be yes?

A Yes, I understand.

Q All right. Now, let me ask you some other questions. And I'm not, again, not trying to be silly. These are important. Do you understand, or feel like you understand, the meaning of the word deliberately as used in common language?

A Yes, I do.

Q In your mind you understand what it means. Do you feel like you understand what the meaning of the

word probability means in common usage?

A Yes.

Q Do you feel like you understand what the words criminal acts of violence mean in common usage?

A Yes.

Q Do you feel like that in the definition of intentionally and knowingly that you understand in your mind what the meaning, and the common usage of the words, or the phrase conscious objective or desire is?

A Yes, I think so.

Q Okay. My question to you, then, will be this: What do you understand that the word deliberately means?

MR. LOBINGIER: Excuse me. I'm going to object to that. I believe it's an improper voir dire question. And, would cite theCCourt to Vytee (phonotic) versus State.

THE COURT: Sustain the objection.

MR. LOBINGIER: Thank you, Your Honor.

MR. CARTER: Your Honor, I have two or three more similar questions. May I continue for the purposes of the Bill?

THE COURT: Yes, you may.

Q (continued by Mr. Carter) I will ask you--and, I hope you understand that this is a legal procedure. And, that we're doing it a certain way because we have to. Do

you know what the word probability means?

A I think I do.

Q All right. What is your meaning of the word possibility?

MR. LOBINGIER: Your Honor, I'm going to object on the same basis.

THE COURT: Sustained.

MR. LOBINGIER: Thank you, Your Honor.

MR. CARTER: May I continue, Your Honor?

THE COURT: Yes, sir.

Q (continued by Mr. Carter) Do you know what the word criminal acts of violence means in common usage?

A I think I do.

Q What does your understanding of that mean?

MR. LOBINGIER: Pardon me, I'm going to object on the same grounds I stated before, Your Honor.

THE COURT: Sustained.

MR. CARTER: May I continue one more, Your Honor?

THE COURT: Yes.

Q (continued by Mr. Carter) And you have stated that you understand what the common usage of the terms conscious objective or desire is. Would you tell us what you feel like that means?

MR. LOBINGIER: Pardon me, Your Honor. Once

APPENDIX D
(Use of unadjudicated extraneous offenses)

THE COURT: All right. Let's have the jury back please, ma'am.

(The jury enters the courtroom.)

THE COURT: Thank you, ladies and gentlemen.

You may continue, gentlemen.

Whereupon,

WILLIAM McKINLEY HILL,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HANNA:

Q State your name for us, sir.

A William McKinley Hill.

Q William McKinley Hill?

A Right.

Q Where do you live, sir?

A 4313 Jana Drive.

Q I will ask you, sir, is that in Fort Worth, Tarrant County, Texas?

A Yes.

Q I will ask you where you were on June the 10th, 1977, at approximately 6:30 p.m.?

A I was on a corner of Terrell and Kentucky.

Q Terrell and Kentucky?

A Yeah.

Q And is that in Fort Worth?

A Well, yes, sir.

Q All right, sir. Did you have occasion to see the Defendant Charles Milton at approximately 6:30 on that date?

A Yes, I did.

Q Was he driving an automobile, or was he in an automobile when you first saw him?

A He was in an automobile, sir.

Q All right, sir. What caused you to pay attention to Charles Milton in this particular automobile?

A Well, he had an accident.

Q Had an accident?

A Yeah.

Q What kind of an accident was it?

A Well, he hit Artie's Red Lounge.

Q Artie's Red Lounge?

A Right.

Q All right. I take it that's a building?

A Right.

Q Did the car hit the building?

A Yes.

Q All right. What happened then?

A The car bounced off the building and stood up on

the wire -- the cable that go from the post to the ground and sit there on level.

Q And what did you do then?

A Well, after we heard the crash, I went over there and I spotted Charles. And well, he is -- I don't know. Seemed like it was -- I don't know what was wrong with him. Something.

Q All right.

A So it was a gun sitting up under the seat so --

MR. WILLIAMS: Now, just a minute. We object to any testimony of this witness in regard to any gun. It would be a specific act of misconduct and also concerning and extraneous offense that would not be admissible in the trial of this cause under any conditions.

THE COURT: The Court will overrule the objection.

MR. WILLIAMS: Note our exception.

THE COURT: Yes, sir.

BY MR. HANNA:

Q All right, sir.

I believe you said that you saw a gun in the car; is that right?

A Yes.

Q And where was it in the car?

A Laying in the floorboard of the car.

Q Front seat?

A The back seat.

Q All right, sir. Was it a rifle or a shotgun or a pistol?

A It was a .32 automatic.

Q All right, sir, and did you see Charles Milton get out of this car?

A Yes.

Q Was anyone else in the car with him?

A No.

Q And what did you do then?

A Well, like someone trying to take the pistol, so I picked the pistol up, and I told him that I would keep it for him because he was in trouble. The law would be there in a few minutes.

Q When we are talking about Charles Milton, we are talking about the man seated at the end of the table over here, aren't we?

A Right.

Q And did you keep that pistol then?

A Yes.

Q Did you have an occasion a few days later to give that particular pistol to a Mr. Jack Gray?

23

A Yes.

Q And is that the uncle of Alfred Gray?

MR. CARTER: Your Honor, we are going to object --

A Yes.

MR. CARTER: -- to any leading questions.

THE COURT: Sustained as to leading.

MR. HANNA: Pass the witness, Your Honor.

MR. WILLIAMS: We have no questions of this witness.

THE COURT: All right.

Thank you, Mr. Hill. You may step down.

Who will you have next, gentlemen?

MR. LOBINGIER: The State will call Bonnie Crabb, Your Honor.

THE COURT: Bonnie Crabb, please.

(Mr. Hill leaves the
(courtroom and Bonnie
(Crabb enters the
(courtroom.)

THE COURT: Mrs. Crabb, raise your right hand and be sworn.

MRS. CRABB: (Witness complies.)

THE COURT: Do you solemnly swear the testimony you are about to give in the trial of this case will be the truth, the whole truth and nothing but the truth, so help you God?

MRS. CRABB: I do.

THE COURT: Be seated, please.

MRS. CRABB: (Witness complies.)

Whereupon,

BONNIE CRABB,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LOBINGIER:

Q Would you state your name please, ma'am.

A Bonnie Crabb.

Q Mrs. Crabb, how are you employed?

A I am self-employed.

Q And what do you do for a living?

A I am a beauty operator. I have a beauty salon.

Q All right.

I am going to ask you to speak up just a little bit louder so all of the people in the jury box can hear what you have to say.

Where is your beauty shop?

A 4100-B East Lancaster.

Q Is that located in Fort Worth, Tarrant County, Texas?

A Yes.

Q How long have you owned this beauty shop, Mrs. Crabb?

A Well, for 26 years. I have only had it at this location since '72.

Q All right.

Were you working in your beauty shop on East Lancaster Street on Wednesday, June the 22nd of 1977?

A Yes.

Q And what hours are you usually open there in your beauty shop?

A Well, it varies.

Q Okay.

A Sometimes late.

Q I take it it depends upon whether you have a customer --

A Right.

Q -- that would hold you up?

A (Witness nods.)

Q Approximately 7:00 o'clock in the evening on Wednesday, June the 22nd, 1977, were you working at that time?

A I had just finished with my last patron.

Q All right.

What were you doing after your last customer or patron had been in?

A I was talking to a friend on the phone -- a patron on the phone.

Q All right.

Had you locked the door to your beauty shop at that time?

A I was unaware it was open. I thought it was locked. It was supposed to have been.

Q Describe for the jury how your door does -- to the beauty shop -- the main entrance to your beauty shop, how it's situated.

A There is a little vestibule. You know, you come in the vestibule, and there is two doors. The one on the right is another business, and on the left is my beauty salon.

Q All right, and I take it from your answer a minute ago that you thought that the main door into the vestibule was locked?

A Right.

Q Mrs. Crabb, I want you to take a look over here at this Defendant Charles Milton seated over here at this other table in the white shirt, and I will ask you if you

saw him about 7:00 o'clock on Wednesday, June the 22nd, 1977?

A Yes, sir.

Q Where was he when you first saw him?

A He was coming in my door to the beauty salon.

Q All right.

Did he say anything to you at this time?

MR. WILLIAMS: Your Honor --

A Yes, sir.

MR. WILLIAMS: -- we are going to object at this time as to the question and the answer because we feel it's going to deal with an extraneous offense and would have no bearing on any issue in this case since specific acts of misconduct of the Defendant are inadmissible.

THE COURT: The objection is overruled.

MR. WILLIAMS: Note our exception.

THE COURT: Yes, sir.

BY MR. LOBINGIER:

Q Mrs. Crabb, did he say anything to you at this time?

A Yes.

Q And what was that?

A He said his wife had called for an appointment

and was supposed to have been called back, but she had not gotten back -- you know, called back.

And I said, "Sir, I don't believe she called here."

Q All right.

Were you still on the telephone at this time?

A No. As he was coming into the shop, I said to this patron, "Just a minute."

And I said, "Could I help you, sir?"

Q All right, and that's when he --

A Yes, sir.

Q -- started in about his wife having called --

A Right.

Q -- for an appointment?

MR. CARTER: Your Honor, I am going to object to the leading questions -- all of the leading questions.

THE COURT: Sustained.

BY MR. LOBINGIER:

Q After he had come in and made these statements to you, what did he do, if anything?

MR. WILLIAMS: Your Honor, again we would object to this question and answer thereto because we feel it's going to deal with an extraneous offense, which is

inadmissible.

THE COURT: Overruled.

MR. WILLIAMS: Note our exception.

THE COURT: You may answer the question, Mrs. Crabb.

A I beg your pardon. What was the question?

BY MR. LOBINGIER:

Q After -- after he had come in and made these statements to you and you responded to them -- to him, what did he do next?

A Oh, when I said, "Sir, I don't believe she called here," he said, "Oh, you don't think she called here?"

I said, "No, sir. I don't."

And that's when he pulled the gun out and walked around the desk.

Q Okay. During this entire time that you were talking with him, would you tell the jury whether or not you had an opportunity to look at him and examine him and observe him?

A Only before he walked around the desk.

Q All right, and I believe you said he pulled a pistol out?

A Right.

MR. WILLIAMS: Your Honor, can we have a running objection to all of the

30

testimony of this witness in regards to a pistol or anything that transpired after this time?

THE COURT: Yes, you may, Mr. Williams.

MR. WILLIAMS: And note our exception.

BY MR. LOBINGIER:

Q After he pulled this pistol, Mrs. Crabb, what did he do next?

A He said he wanted me -- he wanted all of the money out of the drawer.

Q And what did you do?

A I opened the drawer, and he told me to hang up the phone.

And I told the lady I would have to call her back.

And started getting the money out. And he asked me was that my bag sitting there.

I said, "Yes."

And he said, "Open it up and put everything in it," and I did.

Q Okay. How much money was taken that evening, Mrs. Crabb?

A Approximately $514.00.

Q All right. Did the Defendant also take your

31

bag?

MR. WILLIAMS: Your Honor --

A Right.

MR. WILLIAMS -- we are going to object to the leading questions by the counsel.

THE COURT: Sustained.

BY MR. LOBINGIER:

Q After he had demanded that you put the money into your bag, what did you do next, Mrs. Crabb?

A I put all of -- everything in there.

He said, "Everything," and he asked me if I had a safe.

I said, "No."

I just put everything in the bag and emptied the drawer out.

Q Were you afraid?

A I was terrified.

Q What happened next?

A He told me to go back in the back into the restroom, and I did.

Q What happened after you got back to the restroom?

A He told me to sit down, and he said if -- for me not to come out under 15 to 20 minutes or he would blow my head off.

Q Okay. Describe the Defendant's language and manner or demeanor towards you.

A Well, with the exception of one remark in the bathroom, which I would rather not say --

Q Okay.

A -- he was very calm and matter-of-fact.

Q All right. After he told you to stay in the bathroom for 15 or 20 minutes or he would blow your head off, what happened next?

A Well, I heard a thud or something -- a noise out front, and I thought, "Oh, my God. Is he waiting to shoot me or something?"

I wanted to get up and go out, but then I thought I heard the door close. And I sat there for a little while. I don't know how long, and I looked out and there wasn't anyone there.

And I ran out and closed the front door -- the main door and locked it and came back and locked my door. And there was my phone in the middle of the floor, and I guess that was the noise I heard.

Q Was there anything unusual about your phone?

A Well, it was just jerked off of the wall, you know.

Q Well, in other words, was it -- could you use it, or couldn't you use it?

33

A No, I couldn't use it. It was just completely off of the wall.

Q All right. What happened after this, Mrs. Crabb?

A I have a key to the next door because our fuse box is in their place of business, and I ran and got the key and went in there and called the police.

Q Okay. Did the police come out?

A Yes, they did.

Q Okay.

Mrs. Crabb, did you ever give this Defendant Charles Milton any permission to take any of your money or property out of your beauty shop?

A I just did what he said.

Q Okay, but you never gave him your consent or permission to --

A No.

Q -- take it?

During the time that he had the pistol on you and was ordering you to do all these things, were you in fear or imminent bodily injury and death?

A Yes.

Q Do you think that if you didn't do what he told you --

A Yes.

Q -- that he was going to kill you?

34

A I surely did.

Q Okay. Was there anything else taken besides money that day, Mrs. Crabb?

A Everything that was in my billfold, credit cards.

Q Do you recall which hand he had the pistol in?

A The right.

Q He had it in his right hand?

A Right.

Q Did you ever see this Defendant Charles Milton again after the 22nd day of June, 1977?

A Once.

Q And where was that?

A At the police station.

MR. LOBINGIER: Okay. Pass the witness, Your Honor.

MR. WILLIAMS: We have no questions, Your Honor.

THE COURT: All right.

Thank you, Mrs. Crabb. You may step down.

MRS. CRABB: Thank you.

MR. LOBINGIER: The State will call Stacey Meeks, Your Honor.

THE COURT: Stacey Meeks, please.

(Mrs. Crabb leaves the

(courtroom and Mr. Meeks
(enters the courtroom.)

THE COURT: Mr. Meeks, just come around here if you would please, sir, and raise your right hand.

MR. MEEKS: (Witness complies.)

THE COURT: Do you solemnly swear the testimony you are about to give in the trial of this case will be the truth, the whole truth and nothing but the truth, so help you God?

MR. MEEKS: I do.

THE COURT: Be seated right here, please.

MR. MEEKS: (Witness complies.)

Whereupon,

STACEY MEEKS,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LOBINGIER:

Q State your name, please.

A Stacey Meeks.

Q Mr. Meeks, how are you employed, sir?

A I own a car lot.

Q All right, sir, and what's the name of that car

lot?

A Stacey's Auto Sales.

Q All right, sir. Where is it located?

A Now it's on Rosedale, but at the time it was on Lancaster.

Q All right, sir. When did you move from Lancaster to Rosedale?

A April of this year.

Q April of 1978?

A Uh-huh.

Q Prior to April of 1978, did you own a car lot at 6749 East Lancaster?

A Yes, sir.

Q All right, sir. How long have you been in the used car business, Mr. Meeks?

A Up till now, about a year and a half.

Q Were you employed in the used car business back on June the 23rd of 1977?

A Yes.

Q And was your lot located on June the 23rd of 1977 at 6749 East Lancaster?

A Yes.

Q Were you working that day --

A Yes.

Q -- Thursday, June the 23rd?

A Right.

Q Mr. Meeks, let me direct your attention to the Defendant seated over here at this other table in the white shirt, Charles Milton, and I will ask you if you saw him on June the 23rd, 1977, at about 5:30 in the evening?

A Yes.

Q What was he doing when you first saw him?

A Well, he was standing behind me.

Q All right, sir. What were you doing at the time?

A I was vacuuming out a car.

Q All right, sir.

Did you have any conversation with the Defendant at this time?

A Prior to then, no.

Q Well, at the time he approached you as you were vacuuming out the car, did you have any conversation with him? Did he tell you anything?

A Pardon?

Q Did he tell you anything?

MR. CARTER: Your Honor, we are going to object to the leading questions.

THE COURT: Overruled.

MR. CARTER: Note our exception.

A I didn't understand the question.

BY MR. LOBINGIER:

APPENDIX E
(Indictment, Judgment and Sentence)

[illegible] TEXAS [illegible]	DATE 06-24-77 J.P. NO. [illegible]
FORT WORTH TX	I.P. MANAREE DENTON
CE NSEX MAGE 26DOB 03-05-51	C.C.
SE NO. 0119192FILED: (DATE) 07-13-77	AGENCY FORT WORTH PD
ANSFER: COURT DATE	OFFENSE NO. 77-A-62 COURT

INDICTMENT NO. 10805

N THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS OF THE STATE OF TEXAS, duly elected, tried, empaneled, orn and charged to inquire of offenses committed in Tarrant County, in the ate of Texas, upon their oaths do present in and to the iminal District Court No. 4. of said County that * * * * * * *

CHARLES MILTON hereinafter called Defendant, in the County of rrant and State aforesaid, on or about the 24TH day of JUNE 19 77 did

HEN AND THERE INTENTIONALLY CAUSE THE DEATH OF AN INDIVIDUAL, MANAREE DENTON, Y SHOOTING HER WITH A FIREARM; AND THE SAID DEFENDANT DID THEN AND THERE NTENTIONALLY CAUSE THE DEATH OF THE SAID MANAREE DENTON IN THE COURSE OF OMMITTING AND ATTEMPTING TO COMMIT THE OFFENSE OF ROBBERY;

OUNT TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE SAID HARLES MILTON, IN THE COUNTY OF TARRANT AND STATE AFORESAID, ON OR ABOUT THE TH DAY OF JUNE, 1977, DID THEN AND THERE INTENTIONALLY AND KNOWINGLY, WHILE I E COURSE OF COMMITTING THEFT AND WITH INTENT TO OBTAIN AND MAINTAIN CONTROL O OPERTY OF THE OWNER, LEONARD DENTON, TO-WIT: MONEY, WITHOUT THE EFFECTIVE NSENT OF LEONARD DENTON, AND WITH INTENT TO DEPRIVE LEONARD DENTON OF SAID OPERTY, DID THEN AND THERE BY USING AND EXHIBITING A DEADLY WEAPON, TO-WIT: FIREARM, INTENTIONALLY AND KNOWINGLY THREATEN AND PLACE LEONARD DENTON IN AR OF IMMINENT BODILY INJURY AND DEATH;

RAGRAPH TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT, THAT PRIOR THE COMMISSION OF THE AFORESAID OFFENSE BY THE SAID CHARLES MILTON, ON THE ND DAY OF SEPTEMBER, 1972, IN THE DISTRICT COURT OF CLAY COUNTY, TEXAS, IN USE NO. 4838, THE SAID CHARLES MILTON WAS CONVICTED OF A FELONY, TO-WIT: EFT OF CORPOREAL PERSONAL PROPERTY OF VALUE OVER FIFTY DOLLARS, AND SAID NVICTION BECAME FINAL PRIOR TO THE COMMISSION OF THE AFORESAID OFFENSE,

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CRIMINAL DISTRICT COURT No. 2
TARRANT COUNTY, TEXAS
JUL 26 1977
J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

NST THE PEACE AND DIGNITY OF THE STATE.

Criminal District Attorney

Foreman of the Grand Jury

THE STATE OF TEXAS

VS. NO. 10805

CHARGES MILTON

IN THE DISTRICT COURT

TARRANT COUNTY, TEXAS

October 9, 1978

J U D G M E N T

On October 5, 1978, this cause was called for trial and the State appeared by her Criminal District Attorney, and the Defendant, Charles Milton, appeared both in person and represented by attorneys Hon. Harry Williams and Hon. Don Carter, and announced ready for trial; and the State having made know that it would seek the death penalty in this cause and the Defendant having been heretofore arraigned; and it appearing to the Court that the Defendant was mentally competent and the Defendant having been charged in the Indictment with a Capital Offense; thereupon a jury of good and lawful men and women, to-wit: A. J. Sales, Foreman, and eleven others, was duly selected, impaneled and sworn as the law directs, and the said Criminal District Attorney read to the jury the Indictment herein, and the Defendant entered his plea of Not Guilty hereto; and the jury, after hearing the evidence, and being duly charged by the Court, retired to consider its verdict and after deliberation, returned into open court the following verdict, to-wit:

October 9, 1978

We, the jury, find beyond a reasonable doubt that the defendant, Charles Milton, is guilty of the offense of Capital Murder, as charged in the indictment.

/s/ A. J. Sales, Foreman

and the jury, having heard all the evidence, and being duly charged by the Court, retired to consider its verdict, and after due deliberation, returned into open court the following answers to Issues One, Two and Three, and their verdict.

October 9, 1978

SPECIAL VERDICT NO. ONE

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "yes" or "no" as you find the fact to be.

ANSWER: YES

VOL. 6 PAGE 217

SPECIAL VERDICT NO. TWO

Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "yes" or "no" as you find the fact to be.

ANSWER: YES

SPECIAL VERDICT NO. THREE

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, of the deceased?

In your verdict, you will answer "yes" or "no" as you find the fact to be.

ANSWER: YES

We, the jury, having unanimously agreed upon the answers to Special Issues No. 1, No. 2 and No. 3, do hereby return our verdict into open court.

/s/ A. J. Sales, Foreman

It is THEREFORE CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court that the said Defendant is guilty of the felony offense of Capital Murder as found by the jury and that the Defendant committed said offense on the 24th day of June, 1977, as charged in paragraph one of the Indictment, and that his punishment is assessed at Death, and that the Defendant be remanded to the Sheriff of Tarrant County, Texas, or some other person authorized by law, and be confined to await the further Order of this Court herein.

Tom Cave

JUDGE, District Court No. 213th
Tarrant County, Texas

VS. NO. 10805 I

CHARLES MILTON I DECEMBER 11th, 1978

This day this cause being again called, the State appeared by her Criminal District Attorneys and the Attorneys for the Defendant, Hon. Harry Williams and Don Carter being present, the Defendant, Charles Milton, was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the judgment heretofore rendered and entered herein. Thereupon the Defendant, Charles Milton, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon, the Court proceeded, in the presence of the said Defendant, Charles Milton, to pronounce sentence against him as follows:

It is the ORDER Of the Court that the Defendant, Charles Milton, who has been adjudged to be guilty of Capital Murder, as found by the Jury, and it being mandatory that your punishment be death, it is the Order of this Court that your punishment shall be death by intravenous injection of substances in lethal quantity sufficient to cause death until you are dead. I will set the execution date for before the hour of sunrise on May 11th, 1979. Said execution procedure to be determined and supervised by the Director of the Texas Department of Corrections, and that the clerk of this Court issue a death warrant in accordance with this sentence, directed to the Director of the Texas Department of Corrections, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Texas Department of Corrections, or in the event of the death, disability, or absence of both such Director and Warden, then such other person as is appointed by the Board of Directors of the Texas Department of Corrections for that purpose and to deliver such Warrant to the Sheriff of this, the County of Tarrant, State of Texas, to be by him delivered to the said Director of the Texas Department of Corrections, together with the said Charles Milton, and the said Charles Milton is remanded to jail to await transportation to the Department of Corrections at Huntsville, Texas, and the execution of this sentence.

provides that you have sixty days in which the record and the transcript shall be presented and filed with the clerk of this Court, along with the bill of exceptions, and that the proper briefs be filed within the statutory time, and that the matter go to the Court of Criminal Appeals at Austin, Texas, and during the time said Appeal is pending, the execution of this sentence shall be stayed.

Tom Cave
JUDGE 213th DISTRICT COURT

APPENDIX F

(The Court's Charge)

STATE OF TEXAS	I	IN THE 213TH JUDICIAL
VS.	I	DISTRICT COURT
CHARLES MILTON	I	TARRANT COUNTY, TEXAS

MEMBERS OF THE JURY:

The defendant, Charles Milton, stands charged by indictment with the offenses of capital murder and aggravated robbery alleged to have been committed in Tarrant County, Texas, on or about the 24th day of June, 1977. To these charges the defendant has pleaded "not guilty."

You are instructed that the law applicable to this case is as follows:

I

COURT'S CHARGE AS TO GUILT OR INNOCENCE

A person commits the offense of capital murder if that person intentionally causes the death of an individual in the course of committing robbery.

A person commits the offense of robbery if in the course of committing theft as hereinafter defined and with intent to obtain or maintain control of the property of another, he

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of aggravated robbery, if he commits the offense of robbery as hereinafter defined, and he:

(1) causes serious bodily injury to another, or

(2) uses or exhibits a deadly weapon.

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DISTRICT COURT No. 213
TARRANT COUNTY, TEXAS
OCT 7 - 1978
J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

[illegible] and exercising control over the corporeal personal property of another, without the effective consent of such other person, and with the intent to deprive such other person of said property.

"Deprive" means to withhold property from the owner permanently.

"Effective Consent" means assent in fact, whether expressed or apparent, and includes consent by a person legally authorized to act for the owner.

"Possession" means actual care, custody, control or management of property.

"Bodily Injury" means physical pain, illness or any impairment of physical condition.

"Serious Bodily Injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

"Property: means:

(A) Tangible or intangible personal property including anything severed from land; or

(B) a document, including money, that represents or embodies anything of value.

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor.

II

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

III

"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generate by an explosion or burning substance or any device readily convertible to that use.

You are instructed that a handgun is a firearm.

IV

Now, bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that on or about the 24th day of June, 1977, in the County of Tarrant, State of Texas, as alleged in the indictment the defendant, Charles Hilton, did then and there intentionally cause the death of an individual, Hanaree Denton, by shooting her with a firearm while in the course of committing or attempting to commit robbery, you will find the defendant guilty of the offense of capital murder and so say by your verdict, but if you do not so believe or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and proceed to consider whether the defendant is guilty of the lesser included offense of murder.

VI

Bearing in mind the foregoing instructions, if you have found that the defendant, Charles Milton, did not commit the offense of capital murder as alleged or if you have a reasonable doubt thereof, but that you believe from the evidence beyond a reasonable doubt that the defendant, Charles Milton, on or about th 24th day of June, 1977, in the County of Tarrant, State of Texas, did then and there intentionally or knowingly cause the death of an individual, Manaree Denton, by shooting her with a firearm, you will find the defendant guilty of the offense of murder, and so say by your verdict, but if you do not so believe or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict not guilty of murder and proceed to consider whether the defendant is guilty of the offense of aggravated robber as charged in count two of the indictment.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 24th day of June, 1977, in Tarrant County, Texas, the defendant, Charles Milton, did while in the course of committing theft, as that term is herein defined, and with intent to obtain and maintain control of the property to-wit: money, of the owner, Leonard Denton, without the effective consent of Leonard Denton and with intent to deprive Leonard Denton of said property, said Charles Milton, did then and there exhibit a deadly weapon, to-wit: a firearm, intentionally and knowingly threaten and place Leonard Denton in fear of imminent bodily injury and death, then you will find the defendant guilty of aggravated robbery as charged in the indictment, but if you do not so believe or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict not guilty of aggravated robbery and acquit the defendant.

VIII

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to the fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

IX

You are instructed that the Grand Jury indictment is not evidence of guilt. It is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence nor can it be considered by you in passing upon the innocence or guilt of this defendant.

X

During your deliberations in this case, you must not consider, discuss, or relate any matters not in evidence before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

XI

After you have retired to your jury room you should select one of your members as your foreman. It is his duty to preside at your deliberations, vote with you, and, when you have unanimously agreed upon the verdict, to certify to your verdict by signing the same as foreman.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court which is herein given to you and be governed thereby.

XIII

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

XIV

Your verdict must be by a unanimous vote of all members of the jury. In deliberating on this case you shall consider the charge as a whole and you must not refer to or discuss any matters not in evidence before you.

XV

In all criminal cases the burden of proof is on the State and the defendant is presumed to be innocent until the defendant's guilt is established by legal evidence beyond a reasonable doubt; and, in case you have a reasonable doubt of the defendant's guilt, you will acquit the defendant and say by your verdict "not guity."

XVI

If the jury wishes to communicate with the Court pertaining to this case, such communication must be in writing and signed by the foreman and handed to the Bailiff.

Jim Cave
Judge Presiding

We, the jury, find beyond a reasonable doubt that the defendant, Charles Milton, is guilty of the offense of capital murder, as charged in the indictment.

R. J. Sales
FOREMAN

We, the jury, find beyond a reasonable doubt that the defendant, Charles Milton, is guilty of the offense of murder, as charged in the indictment.

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DISTRICT COURT No. 213
TARRANT COUNTY, TEXAS
9:15 P.M.
OCT 9 - 1978
J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

_____
FOREMAN

We, the jury, find beyond a reasonable doubt that the defendant, Charles Milton, is guilty of the offense of, aggravated robbery as charged in the indictment.

_____
FOREMAN

We, the jury, find the defendant, Charles Milton, not guilty.

_____
FOREMAN

THE STATE OF TEXAS	I	IN THE JUDICIAL DISTRICT
	I	
VS.	I	COURT NO. 213
	I	
CHARLES MILTON	I	TARRANT COUNTY, TEXAS

MEMBERS OF THE JURY:

Having found the defendant herein guilty of the offense of capital murder, it now becomes your duty in reaching special verdicts to answer Issues 1, 2, and 3 hereinafter submitted to you.

You are instructed that you may not answer any issue "Yes" unless the jury unanimously concurs, and, in such event, the special verdict is signed by your foreman. You may not answer any issue "No" unless ten or more of the jurors concur, and, in such event, the ten or more jurors concurring shall individually sign the special verdict. However, if the jury unanimously concurs in answering "No" on any issue, the special verdict shall be signed only by the foreman.

COURT'S CHARGE ON SPECIAL ISSUES

The punishment for the offense of capital murder in this State is death or confinement in the Texas Department of Corrections for life.

You are further instructed that if the jury returns an affirmative finding on each of the three issues submitted, this Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

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DISTRICT COURT No. 213
TARRANT COUNTY, TEXAS
OCT 9 - 1978
J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

The burden of proof is on the State. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

You are instructed that in answering the issues submitted to you, you may take into consideration all of the facts shown by the evidence admitted before you in the full trial of this case.

****

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "Yes" or "No" as you find the fact to be.

ANSWER: Yes

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TARRANT COUNTY, TEXAS
OCT 9 - 1978
J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

2:50 P.M.

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "Yes" or "No" as you find the fact to be.

ANSWER: yes

****

SPECIAL VERDICT NO. 3

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, of the deceased?

In your verdict you will answer "Yes" or "No" as you find the fact to be.

ANSWER: yes

In arriving at the answer to the above issues, it will not be proper for you to fix the same by lot, chance, or any other method than by a full, fair, and free exercise of the opinion of the individual juror.

During your deliberations you shall not consider or discuss what the effect of your answer to the above issues might be. More particularly, you are not to consider or discuss any possible actions of the Board of Pardons and Paroles or the Governor nor how long this defendant will be required to serve on a sentence of life imprisonment.

Tom Cave
Judge presiding

We, the Jury, having unanimously agreed upon the answers to Special Issues No. 1, 2, and 3 hereby return our verdict into open court.

A. J. Sales
FOREMAN

We, ten or more members of the Jury, having agreed upon the answers to Special Issues No. 1, 2, and 3 do hereby return our verdict into open court.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CHARLES MILTON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REFUSE TO CONSIDER A FEDERAL CLAIM WHICH WAS NOT RAISED IN THE STATE COURT?

II. WHETHER THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL VIOLATES DUE PROCESS?

III. WHETHER THE REFUSAL OF THE TEXAS COURTS TO DEFINE WORDS OF COMMON AND ORDINARY MEANING VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

IV. WHETHER THE UNOBJECTED TO ARGUMENT OF THE PROSECUTOR CONSTITUTED A COMMENT ON PETITIONER'S FAILURE TO TESTIFY?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING THE WRIT	4
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION	4
II. THIS COURT SHOULD REFUSE TO CONSIDER A CLAIM NOT RAISED IN THE STATE COURT	4
III. THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL DID NOT VIOLATE DUE PROCESS	7
IV. THE REFUSAL OF TEXAS COURTS TO DEFINE WORDS OF COMMON AND ORDINARY MEANING DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS	8
V. THE UNOBJECTED TO ARGUMENT OF THE PROSECUTOR DID NOT CONSTITUTE A COMMENT ON PETITIONER'S FAILURE TO TESTIFY	9
CONCLUSION	10

INDEX OF AUTHORITIES

Cases	Page
Battie v. State, 551 S.W.2d 401 (Tex.Crim.App. 1977)	8
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4
Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App. 1980)	8
Griffin v. California, 380 U.S. 609 (1975)	9
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	8
Hamling v. United States, 418 U.S. 87 (1974)	9
Jurek v. Texas 428 U.S. 262 (1976)	7
King v. State, 553 S.W.2d 105 (Tex.Crim.App. 1977)	8
Milton v. State, 599 S.W.2d 824 (Tex.Crim.App. 1980)	1
Tacon v. Arizona, 410 U.S. 351 (1973)	4,8
United States v. Sorzano, 602 F.2d 1201 (5th Cir. 1979)	10
Statutes	
28 U.S.C. §1257	1
Article 3.01, Vernon's Ann. C. C. P.	2
Article 11.07, Vernon's Ann. C. C. P.	4
Article 37.071, Vernon's Ann. C. C. P.	2

NO. 80-6324

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CHARLES MILTON,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, and, by and through its Attorney General, Mark White, files this its Brief in Opposition.

OPINION BELOW

Petitioner's conviction for capital murder was affirmed on June 11, 1980, in Milton v. State, 599 S.W.2d 824 (Tex. Crim.App. 1980). Motion for Rehearing was denied on December 10, 1980.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3). However,

as noted below in reasons for denying the writ, Petitioner has failed to present to the state court all of the issues presented in his petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also involved are Articles 3.01, and 37.071, Vernon's Ann. C. C. P.

STATEMENT OF THE CASE

On July 26, 1977, Petitioner was indicted for the offense of capital murder. Trial began on September 18, 1978, and on October 9, 1978, Petitioner was found guilty by the jury. The jury thereafter found as true the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P., and, accordingly, punishment was assessed at death.

The record reflects that on June 24, 1977, Petitioner, armed with a pistol, robbed Leonard Denton and his wife, who owned and operated a liquor store in Fort Worth, Texas. During the entire robbery, Petitioner held the gun on Mrs. Denton. After robbing the couple, Petitioner, still holding the gun on Mrs. Denton, ordered the two into a back room. Mr. Denton caught the barrel of the gun, in an attempt to prevent Petitioner from shooting Mrs. Denton. Petitioner and Mr. Denton struggled, with Mr. Denton trying to push the gun away from his wife and Petitioner managing to point the gun back at the woman. After Mrs. Denton struck Petitioner, he again pointed the gun at her and shot her. When Mr. Denton begged Petitioner to leave, stating that Petitioner had killed Mrs. Denton, Petitioner responded "Hell no. I haven't kill her yet, but she is going to die." Petitioner also shot and critically wounded Mr. Denton, who, in spite of his injuries, survived and testified at trial. There was evidence that no one but Petitioner could have pulled the trigger, and Mr. Denton vehemently denied that the shooting occurred accidentally.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to consider the issues presented.

This Court should refuse to consider claims not raised in the state courts. Petitioner has never previously argued that the imposition of the death penalty in his case is disproportionate and constitutes cruel and unusual punishment under the Eighth Amendment. Rather, he only challenged the sufficiency of the evidence under state law. While this Court has consistently declined to review issues not raised or decided in the court below, the state court record reflects that the penalty of death in the instant case is not disproportionate, given the nature and severity of Petitioner's conduct.

The admission of extraneous offenses at the punishment phase of a capital murder trial is constitutionally permissible. This Court found constitutional the Texas death penalty statute because it allowed the jury's consideration of all relevant evidence about the individual defendant, in determining punishment. Whether Petitioner had actual notice of the state's intent to introduce evidence of Petitioner's prior criminal acts presents only a question of fact. The record reflects that Petitioner did have notice.

The refusal of Texas courts to define words of common and ordinary meaning in the capital murder statute does not violate constitutional principles. This Court has previously held that this statutory scheme is sufficient to constitutionally guide the jury's discretion and determination of the punishment issues.

The argument of the prosecutor, when viewed in the context in which it was made, is clearly not a comment on Petitioner's failure to testify. Obviously Petitioner's trial counsel did not believe the argument contained a constitutionally impermissible reference, because the record fails to reflect that he ever voiced any such objection.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced no special or important reasons in this case and none exist.

II.

THIS COURT SHOULD REFUSE TO CONSIDER A CLAIM NOT RAISED IN THE STATE COURT

Petitioner's claim that his sentence of death constitutes cruel and unusual punishment under the Eighth Amendment because it is disproportionate to the nature of his acts was not raised in his appeal to the Texas Court of Criminal Appeals. See, Respondent's Appendix A. Petitioner claimed in state court only that the evidence was insufficient under state law to support the jury's affirmative findings to the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P. Thus, no state court has had the opportunity to review the federal constitutional issue here raised. This Court has consistently declined to review in the petition for writ of certiorari or appeal, issues which were not raised or decided in the court below. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). Petitioner has an available state court procedure for raising his claim in the state courts. See, Article 11.07, Vernon's Ann. C. C. P. Respondent submits that in view of Petitioner's failure to raise this issue below, the absence of any state court ruling on the issue and the fact that a state remedy is available to Petitioner for presenting his claim to the state court, this Court should decline to review this contention.

However, even had this contention been presented to the state court below, it is frivolous in light of the record. On June 24, 1977, Petitioner, armed with a pistol, entered the L & M Liquor Store in Fort Worth, Texas. (S.F. 1992-1993) [1/] He asked the owners, Leonard Denton and his wife of thirty eight (38) years for an item in the store. (S.F. 1999) As Mr. Denton went to get the item, Petitioner turned fast and pulled a .38 caliber revolver. (S.F. 2001) He ordered both Mr. and Mrs. Denton to "hit the floor." (S.F. 2002) Petitioner then demanded that Mrs. Denton get up and put all of the money from the cash register in a bag. (S.F. 2004-2005) Mrs. Denton complied and handed the bag to him. Petitioner also demanded and received the billfolds of Mr. and Mrs. Denton. (S.F. 2059) All of this time Petitioner was pointing the gun at Mrs. Denton. (S.F. 2005) He then ordered both victims into a back room, still holding the gun on Mrs. Denton. (S.F. 2008) Mr. Denton caught the barrel of the gun to keep Petitioner from shooting his wife, and shoved it away. (S.F. 2011) Petitioner turned the gun back towards Mrs. Denton. (S.F. 2012) Five to six times Mr. Denton pushed the gun away from his wife and Petitioner shoved it back. (S.F. 2012) Mrs. Denton struck Petitioner with wine bottles, and Petitioner then swung the gun around and shot her. (S.F. 2015-2018) Mr. Denton cried "Why don't you leave? Haven't you done enough. You have killed my wife," to which Petitioner responded, "Hell no. I haven't killed her yet, but she is going to die." (S.F. 2020)

Mr. Denton and Petitioner then struggled for the gun, and, this time, Petitioner shot Mr. Denton. (S.F. 2021) Someone drove up to the store and Petitioner ran away. Mrs. Denton died, but Mr. Denton survived and testified against

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1/ "Tr." will refer to the state court record containing all pleadings and papers filed in this cause. "S.F." will refer to a transcription of the court reporter's notes from the trial.

Petitioner at trial. Mr. Denton vehemently denied that the shooting was accidental. (S.F. 2057, 2058) He also testified that during the entire struggle, he had his hand on the barrel of the gun. (S.F. 2013, 2023, 2072) There was also evidence to show that only Petitioner's finger could have been on the trigger of the gun. (S.F. 2014)

At the punishment phase of the trial, testimony was introduced that a few days before trial, Petitioner had been carrying another gun in his automobile, and that he had borrowed the gun which he used in this robbery-murder. (S.F. 2349-2353, 2224-2232) Additionally, there was testimony that two days before the robbery-murder, Petitioner had robbed at gunpoint the female owner of another business. After taking her money and purse, Petitioner ordered her into the bathroom of the shop and threatened to "blow her head off." (S.F. 2353-2362) Then, just one day before the instant robbery-murder, Petitioner approached the owner of a car lot, stating that he wanted to buy a car. Once inside the office, Petitioner pulled a pistol on the victim and demanded money. Upon learning that there was no money in the office, Petitioner took the victim's watch, billfold and rings. When the victim had difficulty taking one of his rings off of his finger, Petitioner threatened to "blow it off." After unsuccessfully attempting to take more property, Petitioner ordered the victim into a bathroom and told him to stay or he (Petitioner) would "shoot through the door." (S.F. 2365-2374) In addition, there was evidence that Petitioner had a prior felony conviction for theft. (S.F. 2343)

The state trial record reflects that the evidence is sufficient to support the jury's findings on the special issues. The penalty of death was not disproportionate given the nature and severity of Petitioner's conduct in committing this murder.

III.

THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL DOES NOT VIOLATE DUE PROCESS

The admission of evidence relevant to the jury's determination of the issues at the punishment phase of a capital murder trial does not violate due process. The second statutory question submitted to the jury at the punishment phase of a capital murder trial requires the jury to make a prediction of the future criminal conduct of the defendant. Article 37.071(b)(2), Vernon's Ann. C. C. P. This Court approved this statutory death penalty scheme in Jurek v. Texas, 428 U.S. 262 (1976), specifically stating:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced. 428 U.S. at 277.

Evidence relevant to the jury's determination of the defendant's future criminal conduct, including his prior criminal acts, is properly admissible at the punishment phase of a capital trial. Jurek v. Texas, supra.

Whether Petitioner had actual notice that the State, during punishment proceedings, would present evidence that Petitioner had committed two aggravated robberies shortly before the instant robbery-murder, presents only a question of fact. Contrary to the representations in the petition for writ of certiorari, however, the record does reflect that Petitioner had actual notice that the state intended to introduce this evidence. Prior to trial Petitioner obtained a complete list of all witnesses the state intended to call. (Tr. 18). He had access to the prosecutor's entire file on his case, (Tr. 17, S.F. 36), and he filed a pre-trial motion in limine regarding these extraneous offenses (Tr. 43). Petitioner's trial counsel represented him on these two aggravated robbery offenses, as well as the instant robbery-murder, (S.F. 2) and counsel had a joint discovery hearing

on all three cases (S.F. 2). Prior to the state's introduction of evidence of these two robberies, the prosecutor informed Petitioner's counsel, out of the jury's presence, of the evidence he intended to offer. (S.F. 2345-2348). Petitioner's counsel never claimed at trial that he was in any way surprised by the introduction of this evidence. A question of fact, such as presented here, does not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, supra; Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949).

IV.

THE REFUSAL OF TEXAS COURTS TO DEFINE WORDS OF COMMON AND ORDINARY MEANING DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Article 3.01, Vernon's Ann. C. C. P. provides that:

> All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined.

Words of common meaning, such as "deliberately" and phrases such as "criminal acts of violence," are not specifically defined by 37.071, Vernon's Ann. C. C. P. Thus, these words and phrases must be understood in their common and ordinary meaning. The Texas Court of Criminal Appeals has refused to legislatively create definitions for words undefined by the statute. See, Battie v. State, 551 S.W.2d 401 (Tex.Crim. App. 1977); King v. State, 553 S.W.2d 105 (Tex.Crim.App. 1977). As this Court concluded in Jurek v. Texas, supra, this statute, as enacted, is sufficient to constitutionally guide the jury's discretion and determination of the punishment issues.

In jury selection procedures, the Texas Court of Criminal Appeals has held that while great latitude should be allowed the parties in the conduct of the voir dire examination, the trial court has discretion regarding limitations on voir dire examination. Esquivel v. State, 595 S.W.2d 516, 525 (Tex.Crim.App. 1980); King v. State, supra. The same rule

applies in the federal courts. See, Hamling v. United States, 418 U.S. 87, 139 (1974). The record reflects that the voir dire examination in the instant case was full, complete and fair to Petitioner. Petitioner's contention fails to state a substantial federal question.

V.

THE UNOBJECTED TO ARGUMENT OF THE PROSECUTOR DID NOT CONSTITUTE A COMMENT ON PETITIONER'S FAILURE TO TESTIFY

The statement of the prosecutor which Petitioner contends constituted a comment on his failure to testify must be viewed in the context of the jury argument in which it was made. When the argument is viewed in context, it is clear that it was not intended, and would not naturally and necessarily be viewed by a jury as a comment on Petitioner's failure to testify as prohibited in Griffin v. California, 380 U.S. 609 (1975). Further, Petitioner's trial counsel did not take the argument to be a comment on Petitioner's failure to testify, as the record reflects that he made absolutely no objection to the argument now attacked. The prosecutor argued:

> At one point Mr. Carter, during the voir dire examination, said "you, know, this is not a monster movie." And he gave an example about the martians coming down and doing it, reasonable doubt. Boy, he's right. This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder. But, you know, we picked a jury. Twelve people who had the integrity, the backbone to bow their necks and call it like they see it. I think you're that jury.

Viewed in the context of the argument immediately preceeding, it is very clear that the reference to the "person who lived through that nightmare" was a reference to Mr. Denton, who saw his wife murdered, struggled with Petitioner, and was himself critically wounded. (Respondent's Appendix B). The argument concerning the person "still here to tell [the jury] about it" was an obvious reference to Mr.

Denton's testimony concerning the nightmarish events surrounding the robbery-murder. Trial counsel's failure to object in any way to the argument further supports the conclusion that the argument was not intended or taken by anyone to be a comment on Petitioner's failure to testify. United States v. Sorzano, 602 F.2d 1201, 1202 (5th Cir. 1979).

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that Petitioner's petition for certiorari be denied.

Respectfully submitted,

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APPENDIX A

64268

No. _____

In the

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
CRIMINAL DISTRICT COURT No. 213
TARRANT COUNTY, TEXAS

JAN 21 1980

J. W. BOORMAN
DISTRICT CLERK
By _____ Deputy

CHARLES MILTON

Appellant,

v.

THE STATE OF TEXAS

Appellee.

On Appeal from the 213th Judicial District
Court of Tarrant County, Texas

BRIEF FOR APPELLANT

505 Executive Plaza Building
210 W. 6th Street
Fort Worth, Texas 76102

FRANK W. SULLIVAN, III

Attorney for Appellant.

January 21, 1980

FILED IN
COURT OF CRIMINAL APPEALS
MAR 25 1980
Thomas Lowe, Clerk

TABLE OF CONTENTS

Index of Authorities ii

Nature of the Case 1

Appellant's Grounds of Error 2

Statement of Facts 3

Summary of Argument 5

Argument and Authorities 6

GROUND I: THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDINGS UNDER ART. 37.071, TEX. CODE CRIM. PROC. ANN. (1973) 6

GROUND II: THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHEN THE PROSECUTOR IMPROPERLY COMMENTED ON HIS FAILURE TO TESTIFY 11

GROUND III: THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 38 12

GROUND IV: THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 3 14

GROUND V: THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL THE RIGHT OF A FULL VOIR DIRE EXAMINATION OF THE JURY PANEL IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL 15

GROUND VI: THE USE OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 18

Conclusion and Prayer 22

Certificate of Service 22

APPELLANT'S GROUNDS OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDINGS UNDER ART.37.071, TEX.CODE CRIM.PROC.ANN. (1973).

II. THE APPELLANT WAS DENIED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHEN THE PROSECUTOR IMPROPERLY COMMENTED ON HIS FAILURE TO TESTIFY.

III. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 38.

IV. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT NO. 3.

V. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL THE RIGHT TO A FULL VOIR DIRE EXAMINATION OF THE JURY PANEL IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.

VI. THE USE OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE OF THE TRIAL VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

STATEMENT OF FACTS

On the afternoon of June 24, 1977, Leonard and Menaree Denton were working in the L&M Liquor Store, a business which they owned, (R.1950). At approximately two o'clock a black male entered the store, pulled a gun and pointed it at Mrs. Denton, (R.2002). The gunman ordered Mrs. Denton to give him some money, (R.2004).

After Mrs. Denton handed over a bag of money, the robber told the Dentons to walk to a back room, (R.2010). As they walked toward the room, Mr. Denton grabbed the robber's pistol and began scuffling with him, (R.2013). Mrs. Denton managed to hit the assailant over the head with two wine bottles, but the fight continued. Suddenly, the gun fired and Mrs. Denton fell to the floor, (R.2017).

Mr. Denton yelled, "Why don't you leave? Haven't you done enough. You've killed my wife." According to Mr. Denton, the gunman replied, "Hell no, I haven't killed her yet but she is going to die," (R.2020). The struggle between the two men continued and Mr. Denton was also shot. Despite his wound, however, Mr. Denton managed to twist the pistol out of his assailant's hand, and the fight ended, (R.2024).

When ambulance attendants arrived at the scene, Mrs. Denton was not breathing, (R.1943). She had been shot one time, (R.2236-2244).

Fort Worth police officers, having recovered the weapon at the scene, requested the Bureau of Alcohol, Tobacco and Firearms

to trace the serial number. Ownership of the pistol was traced to an Alfred Gray who told police that he had loaned the pistol to the Appellant, (R.2203-2233).

At trial, Leonard Denton identified the Appellant as being the man who had robbed him, (R.1993). He stated that during the scuffle the Appellant kept pushing the gun so that it would point at Mrs. Denton, (R.2013). On cross-examination, however, he admitted that the gun went off while the two men were fighting and he could not tell the jury that the gun had not fired by accident, (R.2058).

Upon finding the Appellant guilty of capital murder, the jury answered affirmatively the questions posed by art.37.071, TEX.CODE CRIM.PROC.ANN.(1973). The punishment was then automatically assessed as death by injection.

SUMMARY OF ARGUMENT

Charles Milton may deserve life in a penitentiary but he does not deserve, and the evidence in this case does not support, a verdict of death. No human being should die on these facts.

ARGUMENT AND AUTHORITIES

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDINGS UNDER ART.37.071, TEX.CODE CRIM.PROC.ANN. (1973).

This case is a classic example of the injustice which may result from over-zealous and abusive prosecutions under the Texas capital murder statutes. Charles Milton is guilty of aggravated robbery and maybe murder under the felony-murder doctrine. He was guilty of theft of property valued over fifty dollars in 1972. He is obviously guilty of poor judgment and even stupidity. He is not a proper target for death, however, because the death of Menaree Denton was not caused deliberately and there is no competent evidence on which a jury of reasonable people might base a finding that there is "a probability" that this Appellant would constitute a continuing threat to society.

Under TEX.CODE CRIM.PROC.ANN.art.37.071(a) and (b)(1973) the jury in this case was required to find, beyond a reasonable doubt, that (1) the conduct of the Appellant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result; and (2) that there is a probability that the Appellant would commit criminal acts of violence that would constitute a continuing threat to society.

During the punishment phase of the trial, the State introduced evidence that the Appellant was convicted of felony theft in 1972, (R.2337-2345). There was no evidence of any prior

conviction for a crime of violence.

Instead, the prosecution called two witnesses to the stand who testified that the Appellant had also robbed them within a two-day period in June, 1977.

William Hill, a friend of the Appellant, was called to testify that he had seen the Appellant have an automobile accident on June 10, 1977, (R.2350). He saw a pistol under the seat of the Appellant's car and removed it from the scene so that Appellant would not face more trouble when police arrived, (R.2352).

Bonnie Crabb, a beauty operator, told jurors that at approximately 7:00 p.m. on June 22, 1977, the Appellant entered her shop, pulled a gun, and demanded money from the cash drawer, (R.2360). The Appellant then ordered Ms. Crabb into her bathroom and told her to wait fifteen or twenty minutes before calling police, (R.2361). He then fled the scene without doing harm to anyone.

Stacey Meeks, a car dealer, testified that on June 23, 1977, the Appellant pulled a gun, demanded money and took Meek's rings, watch, billfold, and a diamond wedding ring. Meeks was then ordered into a back room and told to wait ten minutes, (R.2365-2377). He was not injured in any way.

The propriety of using unadjudicated extraneous offenses as "evidence" relevant to the 37.071 questions is discussed elsewhere in thie brief. However, even if this Court persists in upholding the prosecution's authority to use such evidence, these facts support the conclusion that Appellant did not deliberately cause the death of the decedent in this case.

Having a wreck is not an act of violence. The robbery modus operandi which is evident from a reading of this transcript encompasses a time span of only three days -- June 22, 23, and 24, 1977. On each of the occasions prior to Mrs. Denton's death, the Appellant ordered his robbery victims to a back room -- not for the purpose of doing them physical harm -- but to insure his escape.

When he robbed Mr. and Mrs. Denton he followed the same pattern he had used on the preceding two days. He ordered them to a back room. The Appellant could not have known that Mr. Denton would engage him in a physical battle for the pistol.

It has been held that "deliberation" and "premeditation" are the same character of mental operation differing only in degree. As stated in BLACK'S LAW DICTIONARY (rev.4th ed.1968):

> "...deliberation is premeditation in a cool state of the blood...(it) is not only to think beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon...State v. Hall, 55 P.2d 740, 742(N. M. 1936); People v. Thomas, 156 P.2d 7,17(Cal.1945); State v. Payne, 197 S.E.573(N.C.1938); State v. Roedl, 155 P.2d 741, 749(Utah 1945); State v. Cade, 34 S.W.2d 82,83(Mo. 1930)."

There is no evidence that the death of Menaree Denton was the result of any deliberation under any definition. On the contrary, the chain of events which caused her death did not begin when the Appellant entered the L&M Liquor Store, but when Mr. Denton began the struggle over the pistol. To

say that the Appellant acted "deliberately" is to ignore the commonly understood meaning of the word.

In Warren v. State, 562 S.W.474(Tex.Crim.App.1978) this Court reviewed another capital murder conviction. Warren, like the Appellant, had one prior conviction for felony theft. He entered a house for the purpose of committing a burglary. While there, the owner of the house walked in and started yelling. Warren pulled a gun and shot the victim in the head. The jury had before it only the evidence of Warren's prior theft conviction and the facts of the case itself. There was no qualified psychiatric testimony which would have had a probative value as to special issue number two under Article 37.071.

In reversing Warren's conviction, this Court held that although the murder committed by Warren was a criminal act of violence, it was not a "calculated act". There was, therefore, no evidence of past violence, no evidence that violence was initially intended and no evidentiary predictions of future violence.

The same conclusion applies to the facts in the case at bar. What evidence is there to support a prediction of future violence? On three days in June, 1977 this Appellant committed three robberies. He had no history of violence. His modus operandi, as developed by the State's own evidence, was to leave his victims in a safe place for only as long as he needed to make his escape. There was no evidence that the Appellant had a degenerate or violent personal history or

that he lacked respect for human life. This record does not even reflect who pulled the trigger.

Appellant is aware that this Court has often found evidence sufficient to sustain convictions for capital murder, Granviel v. State, 552 S.W.2d 107(Tex.Crim.App.1976); Smith v. State, 540 S.W.2d 693(Tex.Crim.App.1973); Livingston v.State, 542 S.W.2d 655(Tex.Crim.App.1976); Moore v. State, 542 S.W. 2d 664(Tex.Crim.App.1976); Felder v. State, 564 S.W.2d 776 (Tex.Crim.App.1978); Duffy v. State, 567 S.W.2d 197(Tex.Crim. App.1978); Bodde v. State, 568 S.W.2d 344(Tex.Crim.App.1978): Hammett v. State, 578 S.W.2d 699(Tex.Crim.App.1979); etc. However, in all of the cases cited above, there was either expert testimony or evidence which tended to make the offenses particularly brutal. Indeed, the circumstances of a given crime may itself be severe enough to sustain affirmative answers to the 37.071 questions, Muniz v. State, 573 S.W.2d 792(Tex.Crim.App.1978).

This case also differs from those in which the 37.071 evidence has been found to be sufficient to sustain a death verdict in that this Appellant's acts were simply unlike the acts of those who are now awaiting execution. Even if this Court should find that there is enough evidence to support the jury's resolution of the probability issue, a most cursory reading of this record would show that this Appellant did not "deliberately" shoot anyone, if he shot them at all.

APPENDIX B

to bolster our witness. And, we're not allowed to do that and he knows he has a right to cross examine a witness if he wants to.

THE COURT: Overrule the objection.

MR. HANNA: This business about the struggle over the gun, they would have you to believe that Mr. Milton's hand is withered. He couldn't use that. He uses his left hand. Put me in this picture right here. Mr. Milton and Mr. Denton are fighting over the gun. The gun's in the left hand. Mrs. Denton is over here. Mr. Milton has the gun in his left hand right here coming to his power. Everyone knows you are stronger pulling into your body right down here. Mr. Denton, they tell you he's right handed. He's got the gun like this and he's trying to get it up here. He was pushing away from his body. He's not as strong. And, again, that may be a minor point. I don't think--surely you wouldn't be sidetracked by something like that. This is not television. This is not Perry Mason where all of a sudden the right hand and the left hand really becomes an issue.

Remember those crime scene pictures. What was going on inside of there. People falling over wine racks. Shots being fired.

D. L. Calvin
Certified Shorthand Reporter

Another point. Holding this gun over your head., as Mr. Williams did and say: "Well, the only way it could have been fired is when it's up over your head." Up over your head, pointed down? Two people fighting over a gun up over your head pointed down? Like this? Of course not. It's up over your head pointed up. If it had been pointed up Manaree Denton would still be alive. It doesn't make sense. Television stuff. This is the real world. I don't think I need to tell you this. People are living and are being shot and dying in their stores right here.

They tell you that what a man says after he shoots somebody has no bearing on what his intent is. Well, that's horse feathers. That's not right. Not only does he make a statement: Pulls the trigger two times after that. This tells you something.

Another point is made by Dr. Grotts, what he wouldn't testify to and what he would. Dr. Grotts wasn't there. If he was there he would have told you what happened. Dr. Grotts is not going to testify as to what position she was in when she was shot. Use your common sense. She was bending over. The projectory of the bullet, there ain't a way in the world that gun was pointed

down like that. That's the silliest thing I've ever heard. If it had been over the head it would have been pointed straight up.

Why didn't the gun go off earlier? It just so happens, just a sheer coincidence, just so happens Mrs. Denton is shot after she has struck him on the head twice with two wine bottles. Broke them. Made him mad. He's over there fighting with the husband. And, all of a sudden you got somebody jumping into the fight. It's not a fair fight — He's mad. He gets cracked over the head with two wine bottles. What does she do? She walks back over toward the cash register. And, like Mr. Williams says everybody knows a gun in a retail store is kept by the cash register. Why would he want to kill her is what Mr. Williams asks you. Very obvious to you, I think. She has hit him on the head twice with two wine bottles. Didn't do any good. And her husband is there struggling with him. What does she do? What would any person do? She knows that gun is there. Where is she shot? (gesturing) Right by the gun. And, ask you why would he want to... Don't you know that Charles Milton had his eye on her as she was walking toward that gun? Don't you know that he was worried?

Don't you know he thought about the fact that a gun is customarily kept by a cash register in a store? Why would he want to kill her? Very obvious.

Mr. Denton, an advocate? An advocate? A witness? Yes. An advocate, no. A victim? Yes. Truthful man? Yes. Like I say, try anybody, try everybody, try anybody; but don't try my client. Try Denton, try Lobingier. Try anybody, but don't try him. Don't think about him. Get the spotlight off of him. It's the oldest trick in the book.

At one point Mr. Carter, during the voir dire examination, said: "You know, this is not a monster movie." And, he gave an example about the martians coming down and doing it; reasonable doubt. Boy, he's right. This is a nightmare. People, a person who lived through that nightmare is still here to tell you about it. Easiest thing in the world for you to do is not to find him guilty of capital murder. But, you know, we picked a jury. Twelve people who had the integrity, the backbone to bow their necks and call it like they see it. I think you're that jury.

First thing I want you to do if you don't remember another thing I've said in this trial, if you forget everything, when you get in that